



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

UC-NRLF



B 3 596 014

California. District Courts of Appeal.  
Reports of cases, 1st

## FACULTY LIBRARY

KFC	vol.	copy
48	37	2
A222		

Please sign below and leave  
this card in the space vacated  
by the book.

California. District Courts of Appeal.  
Reports of cases, 1st

KFC	vol.	copy
48	37	2
A222		











**REPORTS OF CASES**  
**DETERMINED IN**  
**THE DISTRICT COURTS OF APPEAL.**  
**OF THE**  
**STATE OF CALIFORNIA**

---

**FROM APRIL 16, 1918, TO JULY 29, 1918**

---

**RANDOLPH V. WHITING**  
**REPORTER**

**JAMES L. ROBISON**  
**FRED L. STEWART**  
**HENRY F. WRIGLEY**  
**ASSISTANT REPORTERS**

---

**VOLUME 37**

**SAN FRANCISCO**  
**BANCROFT-WHITNEY COMPANY**  
**1920**

**COPYRIGHT, 1920,  
BY  
BANCROFT-WHITNEY COMPANY**

**SAN FRANCISCO  
THE FILMER BROTHERS ELECTROTYPE COMPANY  
TYPOGRAPHERS AND STEREOTYPERS**

# DISTRICT COURTS OF APPEAL

---

## FIRST APPELLATE DISTRICT.

(San Francisco)

THOS. J. LENNON.....	Presiding Justice
FRANK H. KERRIGAN.....	Associate Justice
JOHN E. RICHARDS.....	Associate Justice
J. B. MARTIN.....	Clerk
WALTER S. CHISHOLM.....	Deputy Clerk

Counties of the First Appellate District—San Francisco, Marin, Contra Costa, Alameda, San Mateo, Santa Clara, Fresno, Santa Cruz, Monterey and San Benito.

---

## SECOND APPELLATE DISTRICT.

(Los Angeles)

NATHANIEL P. CONREY.....	Presiding Justice
WILLIAM P. JAMES.....	Associate Justice
VICTOR E. SHAW.....	Associate Justice
W. D. SHEARER.....	Clerk
H. C. LILLIE.....	Deputy Clerk

Counties of the Second Appellate District—San Luis Obispo, Kings, Tulare, Inyo, Kern, Santa Barbara, Ventura, San Bernardino, Los Angeles, Orange, Riverside, Imperial and San Diego.

---

## THIRD APPELLATE DISTRICT.

(Sacramento)

N. P. CHIPMAN.....	Presiding Justice
A. G. BURNETT.....	Associate Justice
E. C. HART.....	Associate Justice
JOHN T. STAFFORD.....	Clerk
CAVINS HART.....	Deputy Clerk

Counties of the Third Appellate District—Del Norte, Siskiyou, Modoc, Humboldt, Trinity, Shasta, Lassen, Tehama, Plumas, Mendocino, Lake, Colusa, Glenn, Butte, Sierra, Sutter, Yuba, Nevada, Sonoma, Napa, Yolo, Placer, Solano, Sacramento, El Dorado, San Joaquin, Amador, Calaveras, Stanislaus, Mariposa, Madera, Merced, Tuolumne, Alpine and Mono.



## TABLE OF CASES—VOL. 37.

---

Adams, City of Oakland v.....	614
Ah Gee, People v.....	1
Aickley, Bond v.....	11
Akahori, Penryn Land Company v.....	14
Allen, People v.....	130
Allen, Pullin v.....	218
Alloggi v. Southern Pacific Company.....	72
Alsaga v. Hart.....	770
American National Bank of San Francisco, Grange v.....	432
Anderson v. Neal Institutes Company.....	174
Application of Perry.....	189
Application of Thompson.....	344
Application of Thurber.....	571
Application of Turek.....	601
Aston, Pringle v.....	409
Bakeman v. Superior Court of County of Los Angeles.....	785
Barnum, Frame v.....	411
Basler, Wood & Tatum Company v.....	381
Bauer, Burns v.....	251
Bauer, Hurt v.....	109
Bazzuro, Croce v.....	167
Belland, Collins v.....	189
Bennett, Catlett v.....	91
Bennett v. Hillman.....	586
Bekins v. Smith.....	222, 802
Bennett, People v.....	324
Benson, Robben v.....	227
Blake v. Craig.....	327
Board of Education of City of Oakland, Catania v.....	133
Board of Fire Commissioners of San Francisco, McCarthy v....	495
Bohlig, Hornlein v.....	646
Bohrmann, Firth v.....	803
Bond v. Aickley.....	11
Boot v. Boyd.....	545
Booth, People v.....	650
Boyce, Tulloh v.....	761
Boyd, Boot v.....	545
Boyd, Buick v.....	508
Bradley, Bradley Company v.....	263, 268, 270
Bradley Company v. Bradley.....	263, 268, 270



Brown, People v.....	101
Bruns, Heitman v.....	489
Buick v. Boyd.....	508
Burdell v. St. Luke's Hospital.....	810
Burger, Hope Mining Company v.....	239
Burns v. Bauer.....	251
Burt Motor Car Company, Magee v.....	737
Burton Auto Transfer Company v. Industrial Accident Commission .....	657
California Rice Milling Co., Doty v.....	449
California Vegetable Union v. Crocker National Bank of San Francisco .....	743
Campbell v. Ingram.....	728
Canepa, Myers v.....	556
Catania v. Board of Education of City of Oakland.....	593
Catlett v. Bennett.....	91
Central California Traction Co., Ellis v.....	390
Central Forest Company, Mendoza v.....	289
Ceremony v. Drummond .....	446
Chapin, Spaulding & Company v. ....	573
Chase v. Peters.....	358, 815
City and County of San Francisco, Kydd v.....	598
City of Lemoore, People v.....	79
City of Marysville, Malaley v.....	638
City of Oakland v. Adams.....	614
City of Petaluma v. Hughes.....	473
City of Petaluma, Weissband v.....	296
Clark v. Superior Court of County of Los Angeles.....	732
Clark & Henery Construction Co., Lillie v.....	815
Clark & Henery Construction Co., Wentland v.....	34
Cline, County of Los Angeles v.....	607
Cohn v. Smith.....	764
Colby, Paramore v.....	648
Collins v. Belland.....	139
Combined Amusements Company, Jordan v.....	8
Connell v. McGahie.....	439
Corbett v. Spanos.....	200
County of Los Angeles v. Cline.....	607
County of Sacramento, Gibson v.....	523
County of Tuolumne, Thiel Detective Company v.....	423
Cowell, Skelly v.....	215
Cowell Lime & Cement Co., Doran, Brouse & Price v.....	478
Cowell Lime & Cement Co., Long v.....	67
Cowell Lime & Cement Co., Osborn v.....	67
Craig, Blake v.....	327
Craig v. Stansbury.....	668
Crane Company v. Maryland Casualty Company.....	87

Crawford, Rose v.....	664
Croce v. Bazzuro .....	167
Crocker National Bank of San Francisco, California Vegetable Union v.....	743
Cutting, Heitman v.....	236
Davidson v. Rafael.....	258
Davitt, MacKnight v.....	720
Delgado, People v. ....	807
Dillman, People v.....	415
Donnelly v. Wetzol.....	741
Donovan, Tracy v.....	350
Doran, Brouse & Price v. Henry Cowell Lime & Cement Co.....	478
Doty v. California Rice Milling Co.....	449
Doty v. Matson.....	817
Dow v. George E. Dow Estate Co.....	20
Dow Estate Company, Dow v.....	20
Drummond, Ceremony v.....	446
Dutton v. Locke-Paddon.....	693
Dutwiler v. Klunk.....	796
Eantosea, People v.....	515
Edson v. Mancebo.....	22
Ellis v. Central California Traction Co.....	390
Ellison, Turman v.....	204
Emigh-Winchell Hardware Co. v. Pylman.....	533
Erskine v. Marchant .....	590
Ewing v. Richvale Land Company.....	53
Farullo, Zucco v.....	562
Fassio v. Woolfrey.....	754
Favilla, Mora v.....	164
Federal Construction Company v. Kneese.....	659
Ferguson v. Marsh.....	482
Fest v. Superior Court of Sonoma County.....	95
First State Bank of Clovis, Van Hagen v.....	141
Firth v. Bohrmann.....	803
Flacco, People v.....	683
Fleishhacker v. Moran.....	214
Flinn v. Zion.....	110
Fook, Sure v.....	465
Frame v. Barnum .....	411
Franich, J. & H. Goodwin, Ltd. v.....	493
Frost, People v.....	120
Fuller, Wilson v.....	355
Gartland, Scholz v.....	284
Gastone, People v.....	51

George E. Dow Estate Co., Dow v.....	20
Gibson v. County of Sacramento.....	523
Goodall v. Superior Court of County of Santa Barbara.....	723
Gordon v. Ransome-Crummey Company.....	753
Graham, Nave v.....	332
Grange v. American National Bank of San Francisco.....	432
Greer-Robbins Company v. Pacific Surety Company.....	540
Guajardo, Moore v.....	342
Hagen v. First State Bank of Clovis.....	141
Hagerty, Tucker v.....	789
Hammond v. Justice's Court of Los Angeles Township.....	506
Hart, Alsaga v.....	770
Hartwell, People v.....	799
Hayes, Valentine v.....	42
Heitman v. Bruns.....	483
Heitman v. Cutting.....	233
Henry Cowell Lime & Cement Co., Doran, Brouse & Price v....	478
Henry Cowell Lime & Cement Co., Long v.....	67
Henry Cowell Lime & Cement Co., Osborn v.....	67
Herman v. Rohan .....	678
Hillman, Bennett v.....	586
Hing v. Lee.....	313
Hoffman v. Pacific Coast Construction Co.....	125
Holland-Meisell Company v. Kelly.....	610
Hope Mining Company v. Burger.....	239
Hornlein v. Bohlrig.....	646
Houston, Gore & Loy, Wheeler v.....	407
Hubermann v. National Surety Company.....	569
Huey v. Patterson.....	335
Hughes, City of Petaluma v.....	473
Hurt v. Bauer.....	109
Huse, Whitecomb v.....	243
Indian Spring Channel Gold Mining Co., Moore v.....	370
Industrial Accident Commission, Burton Auto Transfer Co. v....	657
Industrial Accident Commission, Kauffman v.....	500
Industrial Accident Commission, Rosedale Cemetery Association v.	706
Ingram, Campbell v.....	728
In re Perry .....	189
In re Thompson .....	344
In re Thurber .....	571
In re Turek .....	601
Irvine v. Postal Telegraph Cable Company.....	60
Jacinto, People v.....	655
J. & H. Goodwin, Ltd., v. Franich.....	493
Jordan v. Combined Amusements Company.....	8
Justice's Court of Los Angeles Township, Hammond v.....	506

Kauffman v. Industrial Accident Commission.....	500
Kawananakoa, People v.....	433
Kelly, Holland-Meisell Company v.....	610
Kelsey Company v. Spears.....	27
Klunk, Dutwiler v.....	796
Kneese, Federal Construction Company v.....	659
Krohn v. Reclamation District No. 17.....	818
Kydd v. City and County of San Francisco.....	593
Laurel Hill Cemetery Association, Polk v.....	624
Lee, Hing v.....	313
Lee Sing Park, People v.....	652
Lemoore, City of, People v.....	79
Lillie v. Clark & Henery Construction Co.....	815
Linn v. Piersol.....	171
Lion Clothing Co., Pacific Railways Advertising Co. v.....	387
Locke-Paddon, Dutton v.....	693
London Guarantee & Accident Company, Wilson v.....	245
Long v. Henry Cowell Lime & Cement Co.....	67
Lorden, Sea v.....	444
Los Angeles, County of, v. Cline.....	607
Lutton v. Bau.....	429
Macdonald, Smith v.....	503
Macknight v. Davitt.....	720
Magee v. W. J. Burt Motor Car Company.....	737
Malaley v. City of Marysville.....	638
Mancebo, Edson v.....	22
Marchant, Erskine v.....	590
Marsh, Ferguson v.....	482
Martin, People v.....	213
Maryland Casualty Company, Crane Company v.....	87
Marysville, City of, Malaley v.....	638
Matson, Doty v.....	817
Matthews v. Matthews.....	259
Mauchle v. Panama-Pacific International Exposition Company...	715
McCarthy v. Board of Fire Commissioners of San Francisco.....	495
McGahie, Connell v.....	439
McKillop, Meyers v.....	144
McManus v. Red Salmon Canning Co.....	133
Mendoza v. Central Forest Company.....	289
Merchants Collection Agency v. Roantree.....	88
Meyers v. McKillop.....	144
Middleton, Whitcomb v.....	248
Mitchell v. Wood.....	329
Molloy v. Pierson.....	486
Moore v. Guajardo.....	342
Moore v. Indian Spring Channel Gold Mining Co.....	370

Moosios v. Rusconi.....	471
Mora v. Favilla.....	164
Moran, Fleishhacker v.....	214
Morneault v. National Surety Company.....	285
Mouren, Mueller v.....	768
Mueller v. Mouren .....	768
Munson, Pasadena Rapid Transit Co. v.....	352
Myers v. Canepa.....	556
National Surety Company, Hubermann v.....	569
National Surety Company, Morneault v.....	285
Nave v. Graham.....	332
Neal Institutes Company, Anderson v.....	174
Ncumiller, Spurrier v.....	683
Oakland, City of, v. Adams.....	614
O'Donnell, People v.....	192
Osborn v. Henry Cowell Lime & Cement Co.....	67
Ott, Rutherford v.....	47
Pacific Coast Construction Company, Hoffman v.....	125
Pacific Fire Extinguisher Co., Park v.....	112
Pacific Railways Advertising Co. v. Lion Clothing Co.....	387
Pacific Surety Company, Greer-Robbins Company v.....	540
Panama-Pacific International Exposition Company, Mauchle v...	715
Paramore v. Colby.....	648
Park v. Pacific Fire Extinguisher Company.....	112
Pasadena Rapid Transit Company v. Munson.....	352
Patterson, Huey v.....	335
Patterson, Riggins v.....	319
Penryn Land Company v. Akahori.....	14
Pensinger, Pitt v.....	199
People v. Ah Gee.....	1
People v. Allen .....	180
People v. Bennett .....	324
People v. Booth .....	650
People v. Brown .....	101
People v. City of Lemoore.....	79
People v. Delgado .....	807
People v. Dillman .....	415
People v. Eantosca .....	515
People v. Flacco .....	683
People v. Frost .....	120
People v. Gastone .....	51
People v. Hartwell .....	799
People v. Jacinto .....	655
People v. Kawananakoa .....	433
People v. Lee Sing Park.....	652

People v. Martin .....	213
People v. O'Donnell .....	192
People v. Pimentel .....	682
People v. Pope .....	656
People v. Rossi .....	778
People v. Sansom .....	435
People v. Soldavini .....	331
People v. Swensen .....	262
People v. Tinney .....	811
People v. Warringer .....	107
People v. William Yee .....	579
People v. Yee .....	579
Perry, In re.....	189
Petaluma, City of v. Hughes.....	473
Petaluma, City of, Weissband v.....	296
Peters, Chase v.....	358, 815
Piersol, Linn v.....	171
Pierson, Molloy v.....	486
Pimentel, People v.....	682
Pitt v. Pensinger.....	199
Planz, Ravn v.....	735
Polk v. Laurel Hill Cemetery Association.....	624
Pope, People v.....	656
Postal Telegraph-Cable Company, Irvine v.....	60
Pratt, Williamson v.....	363
Pringle v. Aston .....	409
Pullin v. Allen .....	218
Pylman, Emig-Winchell Hardware Co. v.....	533
Rafael, Davidson v.....	258
Baisch v. Regents of the University of California.....	697
Ransome-Crummey Company, Gordon v.....	755
Rau, Lutton v.....	429
Ravn v. Planz .....	735
Reclamation District No. 17, Krohn v.....	818
Red Salmon Canning Co., McManus v.....	133
Regents of the University of California, Baisch v.....	697
Reuter v. San Pedro, Los Angeles & Salt Lake R. R. Co.....	277
Richvale Land Company, Ewing v.....	53
Riggins v. Patterson.....	319
Roantree, Merchants Collection Agency v.....	88
Robben v. Benson.....	227
Roberts, Vandelinder v.....	404
Rohan, Herman v.....	678
Rose v. Crawford .....	664
Rosedale Cemetery Association v. Industrial Accident Commis- sion .....	706
Rosenthal, Uhte v.....	519

Rossi, People v.....	778
Rusconi, Moosios v.....	471
Rutherford v. Ott.....	47
Sacramento, County of, Gibson v.....	523
St. Luke's Hospital, Burdell v.....	310
San Francisco, City and County of, Kydd v.....	593
San Pedro, Los Angeles & Salt Lake R. R. Co., Reuter v.....	277
Sansom, People v.....	435
Scholz v. Gartland.....	284
Schubert, Sobaje v.....	709
Sea v. Lorden.....	444
Simmons v. Superior Court of County of San Diego.....	676
Skelly v. Cowell.....	215
Smith, Bekins v.....	222, 802
Smith, Cohn v.....	761
Smith v. Macdonald .....	503
Sobaje v. Schubert .....	709
Soldavini, People v.....	331
Southern Pacific Company, Alloggi v.....	72
Spanos, Corbett v.....	200
Spaulding & Company v. Chapin.....	573
Spears, Kelsey Company v.....	27
Spurrier v. Neumiller.....	683
Stansbury, Craig v.....	663
Stansbury v. Superior Court of Los Angeles County.....	668
Superior Court of County of Los Angeles, Bakeman v.....	785
Superior Court of County of Los Angeles, Clark v.....	732
Superior Court of County of San Diego, Simmons v.....	676
Superior Court of County of Santa Barbara, Goodall v.....	723
Superior Court of Los Angeles County, Stansbury v.....	668
Superior Court of Los Angeles County, Van Alen v.....	696
Superior Court of Sonoma County, Fest v.....	95
Sure v. Fook.....	465
Swensen, People v.....	262
Thiel Detective Company v. County of Tuolumne.....	423
Thompson, In re.....	344
Thurber, In re.....	571
Tinney, People v.....	811
Tracy v. Donovan.....	350
Tucker v. Hagerty.....	789
Tulloh v. Boyce.....	761
Tuolumne, County of, Thiel Detective Company v.....	423
Turck, In re.....	601
Turman v. Ellison.....	204
Ty Fook, Wong Ah Sure v.....	465
Uhte v. Rosenthal.....	519

Valentine v. Hayes .....	42
Van Alen v. Superior Court of Los Angeles County.....	696
Vandelinder v. Roberts.....	404
Van Hagen v. First State Bank of Clovis.....	141
Ventura Manufacturing and Implement Co. v. Warfield.....	147
Wahl v. Yori.....	773
Warfield, Ventura Manufacturing and Implement Co. v.....	147
Warringer, People v.....	107
Weissband v. City of Petaluma.....	296
Wentland v. Clark & Henery Construction Co.....	34
Western Fish Company, White v.....	261
Wetzel, Donnelly v.....	741
Wheeler v. Houston, Gore & Loy.....	407
Whitcomb v. Huse.....	248
Whitcomb v. Middleton.....	248
White v. Western Fish Company.....	261
Williamson v. Pratt.....	363
William Yee, People v.....	579
Wilson v. Fuller.....	355
Wilson v. London Guarantee & Accident Company.....	245
W. J. Burt Motor Car Company, Magee v.....	737
Wong Ah Sure v. Ty Fook.....	465
Wood, Mitchell v.....	329
Wood & Tatum Company v. Basler.....	381
Woolfrey, Fassio v.....	754
Yee, People v.....	579
Yori, Wahl v.....	773
Zion, Flinn v.....	110
Zucco v. Farullo.....	562





## TABLE OF CASES CITED—VOL. 37.

Aalwyn v. Cobe, 168 Cal. 165.....	601
Adams v. Crawford, 116 Cal. 495.....	555
Adams v. Lombard, 80 Cal. 426.....	266
Adams v. Prather, 176 Cal. 164.....	803
Adams v. San Francisco, 50 Cal. 117.....	609
Agard v. Shaffer, 141 Cal. 725.....	414
Alcatraz etc. Assn. v. United States Fidelity etc. Co., 3 Cal. App. 338.....	769
Aldrich v. Thurston, 71 Ill. 324.....	85
Alexander v. McDow, 108 Cal. 25.....	564
Alferitz v. Cahen, 145 Cal. 397.....	19
Aliso Water Co. v. Baker, 95 Cal. 268.....	623
Allen v. Culver, 3 Denio (N. Y.), 284.....	430
Althof v. Conhoim, 38 Cal. 230.....	130
American-Hawaiian etc. Co. v. Butler, 165 Cal. 497.....	491
Amestoy v. Electric Rapid T. Co., 95 Cal. 311.....	564
Anderson v. Black, 70 Cal. 231.....	555
Anderson v. Foley Bros., 110 Minn. 151.....	708
Anderson v. Johnston, 120 Cal. 657.....	536
Anderson v. Richardson, 92 Cal. 623.....	368
Anderson v. Wilkins, 142 N. C. 154.....	692
Anderson v. Wilstrup, 34 Cal. App. 771.....	722
Anglo-Californian Bank v. Cerf, 142 Cal. 303.....	673
Anvil H. & D. Co. v. Code, 182 Fed. 205.....	85
Argenti v. San Francisco, 16 Cal. 255.....	339, 340
Arnold v. Krigbaum, 169 Cal. 143.....	360, 361
Arnold v. St. Louis, 152 Mo. 173.....	637
Austin v. Wilcoxson, 149 Cal. 24.....	210
Bailey v. Dale, 71 Cal. 34.....	130
Bailey v. Maguire, 22 Wall. (U. S.) 215.....	691
Baker, Matter of, 153 Cal. 537.....	304
Baker v. Webber, 102 Me. 414.....	233
Bakersfield Town Hall Assn. v. Chester, 55 Cal. 98.....	225
Bannerman v. Boyle, 160 Cal. 197.....	523
Banning v. Marleau, 101 Cal. 238.....	550
Barber Asphalt Paving Co. v. Jurgens, 170 Cal. 273.....	705
Barker Bros. v. Joos, 36 Cal. App. 311.....	
.....200, 333, 343, 409, 445, 541, 570,	799
Barnard v. Cushing, 4 Met. (Mass.) 230.....	505
Barnes v. McAllister, 18 How. Pr. (N. Y.) 534.....	177
Barrett v. Southern Pac. Co., 91 Cal. 296.....	630
Barrows v. Knight, 55 Cal. 155.....	538
Barthel v. Board of Education, 153 Cal. 376.....	597
Beattie v. People, 33 Ill. App. 651.....	726
Bechtel v. Wier, 152 Cal. 443.....	673
Becker v. Schwerdtle, 141 Cal. 386.....	238
Beckwith v. Sheldon, 168 Cal. 742.....	64
Behrens, Estate of, 130 Cal. 416.....	304
Bekins v. Smith, 37 Cal. App. 222.....	803

Bell v. Marsh, 80 Cal. 411.....	276
Bell v. Thompson, 8 Cal. App. 483.....	578
Bellus v. Peters, 165 Cal. 112.....	492
Belser v. Hoffschneider, 104 Cal. 455.....	806
Benedict v. Greer-Robbins Co., 26 Cal. App. 468.....	740
Ben Lomond Wine Co. v. Sladky, 141 Cal. 622.....	361
Benson v. Bunting, 141 Cal. 462.....	701
Benson v. Shotwell, 87 Cal. 49.....	230
Bird v. American Surety Co., 175 Cal. 625.....	768
Bixler v. Board of Supervisors, 59 Cal. 698.....	690
Blondeau v. Snyder, 95 Cal. 521.....	575
Board of Education v. San Diego, 128 Cal. 369.....	688
Boas v. Farrington, 85 Cal. 535.....	234
Bolen Coal Co. v. Ryan, 48 Mo. App. 515.....	85
Boles v. Johnston, 23 Cal. 226.....	673
Bollinger v. Bollinger, 154 Cal. 695.....	209
Bond v. Aickley, 168 Cal. 161.....	11
Bond v. Pacheco, 30 Cal. 530.....	578
Bone v. Hayes, 154 Cal. 765.....	78
Bonetti v. Treat, 91 Cal. 223.....	430
Bonner v. Quackenbush, 51 Cal. 180.....	304
Boscut v. Waldmann, 31 Cal. App. 245.....	540
Bowdoin College v. Merritt, 75 Fed. 480.....	51
Bradley Co. v. Bradley, 165 Cal. 237.....	272
Bradley Co. v. Bradley, 37 Cal. App. 270.....	264
Branson v. Labrot, 81 Ky. 638.....	635
Bray v. Lowery, 163 Cal. 256.....	132
Bresce v. Los Angeles Traction Co., 149 Cal. 131.....	397
Briggs v. McCullough, 36 Cal. 542.....	314
Brison v. Brison, 75 Cal. 525.....	265
Brown v. Ferrea, 51 Cal. 552.....	673
Brown v. Industrial Acc. Commission, 174 Cal. 457.....	708
Brown v. Mercantile T. & D. Co., 87 Md. 377.....	268
Brown v. Sterling Fixture Co., 175 Cal. 563.....	734
Brownell v. Superior Court, 157 Cal. 703.....	30
Bruce v. Rayner, 124 Fed. 481.....	572
Bruch v. Colombet, 104 Cal. 347.....	374
Brunt v. Farinholt, 121 Md. 126.....	533
Brush v. Smith, 141 Cal. 467.....	576
Bryan v. Berry, 8 Cal. 130.....	672
Bryant v. Pacific Electric Ry. Co., 174 Cal. 734.....	396
Buckley, In re, 69 Cal. 1.....	726
Budd v. Superior Court, 14 Cal. App. 256.....	99
Burris, In re, 147 Cal. 370.....	349
Byrne v. Byrne, 113 Cal. 294.....	492
Caddy v. Rapid Transit Co., 195 N. Y. 415.....	295
California Central Creameries Co. v. Crescent City Light etc. Co., 30 Cal. App. 619.....	578
Canadian etc. Trust Co. v. Clarita Land etc. Co., 140 Cal. 672....	576
Capuchino Land Co. v. Board of Trustees of San Bruno, 34 Cal. App. 239.....	85
Carrington v. Smithers, 26 Cal. App. 460.....	384
Carteri v. Roberts, 140 Cal. 164.....	351
Case v. Board of Commissioners, 4 Kan. 511.....	529
Chadbourne v. Springfield St. Ry. Co., 199 Mass. 574.....	397
Chamberlain v. Bell, 7 Cal. 293.....	232
Chamberlain v. California Edison Co., 167 Cal. 500.....	717
Chase v. Peters, 37 Cal. App. 358.....	816

Chase v. Peters, 37 Cal. App. 815.....	359
Chase v. Trout, 146 Cal. 350.....	757, 758, 760
Chicago Co. v. Sharp, 63 Fed. 532.....	77
Chung Kee v. Davidson, 73 Cal. 522.....	485
Chung Kee v. Davidson, 102 Cal. 188.....	485
City of Los Angeles v. Zeller, 176 Cal. 194.....	589
City of Napa v. Maxwell, 36 Cal. App. 103.....	475
City of Oakland v. Pacific Coast Lumber Co., 171 Cal. 392.....	618
City of Oakland v. Wheeler, 34 Cal. App. 442.....	616, 617
City of Sacramento v. Swanston, 29 Cal. App. 212.....	374
City Street Improvement Co. v. Regents, 153 Cal. 776.....	699, 700
Clark v. Tulare D. Co., 14 Cal. App. 432.....	492
Clarke v. Connecticut Co., 83 Conn. 219.....	397
Clay v. Superior Court, 32 Cal. App. 189.....	98, 99
Clouse v. San Diego, 159 Cal. 436.....	475
Coburn v. Goodall, 72 Cal. 498.....	513
Coffey, Matter of, 123 Cal. 522.....	348
Cohen, Ex parte, 6 Cal. 319.....	788
Cohen v. Alameda, 168 Cal. 265.....	375
Coker v. Superior Court, 58 Cal. 177.....	99
Colton v. Seavey, 22 Cal. 497.....	367
Colusa County v. De Jarnett, 55 Cal. 373.....	426
Commercial Bank v. Redfield, 122 Cal. 405.....	304
Commonwealth v. Holstine, 132 Pa. St. 357.....	186
Commonwealth v. Reinecke Coal Min. Co., 117 Ky. 885.....	378
Conklin v. Woody, 33 Cal. App. 554.....	531
Conlin v. Osborn, 161 Cal. 659.....	469
Conniff v. San Francisco, 67 Cal. 45.....	306, 307
Continental B. etc. Assn. v. Woolf, 12 Cal. App. 726.....	667
Contra Costa Water Co. v. Breed, 139 Cal. 432.....	340
Cooper v. Overton, 102 Tenn. 211.....	637
Cormerais v. Genella, 22 Cal. 116.....	57
County of Alameda v. Evers, 136 Cal. 132.....	427
County of Colusa v. County of Glenn, 117 Cal. 434.....	340
County of Los Angeles v. City of Los Angeles, 65 Cal. 477.....	339, 340
County of Modoc v. Spencer, 103 Cal. 498.....	531
County of San Diego v. Schwartz, 145 Cal. 49.....	609
County of Santa Clara v. Branham, 77 Cal. 592.....	609
County of Santa Cruz v. McPherson, 133 Cal. 282.....	427
County of Siskiyou v. Gamlich, 110 Cal. 94.....	806
County of Yolo v. Joyee, 156 Cal. 429.....	427
Coveny v. Hale, 49 Cal. 552.....	304
Cowdell v. Lánforth, 10 Cal. App. 8.....	568
Cowden, In re, 139 Cal. 244.....	788
Crane, Matter of, 26 Cal. App. 22.....	373
Creed v. McCombs, 146 Cal. 449.....	663
Crim v. Kessing, 89 Cal. 478.....	140
Cross v. Eyerley, 86 Neb. 516.....	538
Crowley v. Superior Court, 10 Cal. App. 342.....	99
Culver v. Rodgers, 33 Ohio St. 537.....	130
Cummings v. Ross, 90 Cal. 68.....	276
Curtis, In re, 108 Cal. 661.....	528
Daly v. Smith, 49 How. Pr. (N. Y.) 150.....	177
Dawson v. Schloss, 93 Cal. 194.....	305
De Costa v. Comfort, 80 Cal. 507.....	330
De Molera v. Martin, 120 Cal. 544.....	305
Dennis v. Crocker-Huffman etc. Co., 6 Cal. App. 58.....	95, 561
Diamond v. Sanderson, 103 Cal. 97.....	266

Diehl v. Zanger, 39 Mich. 601.....	370
Diggins v. Hartshorne, 108 Cal. 154.....	701, 703
Dillon v. Porter, 36 Minn. 341.....	577
D. M. Osborne & Co. v. Backer, 81 Iowa, 375.....	161
Dodge, Matter of, 135 Cal. 512.....	609
Dollar v. International Banking Corp., 13 Cal. App. 331.....	243
Domestic and Foreign Mission Societies' Appeal, 30 Pa. St. 436..	50
Donovan v. McDevitt, 36 Mont. 61.....	129
Dorsey v. Manlove, 14 Cal. 553.....	793
Doty v. California Rice M. Co., 37 Cal. App. 449.....	817
Doudell v. Shoo, 20 Cal. App. 424.....	776
Drouillard v. Southern Pac. Co., 36 Cal. App. 447.....	396
Eachus v. Los Angeles Ry. Co., 103 Cal. 614.....	306, 307
Egilbert v. Superior Court, 6 Cal. App. 190.....	788
Eldon Ice Co. v. Van Hooser, 163 Mo. App. 591.....	130
Electric Light & Power Co. v. San Bernardino, 100 Cal. 348....	115
Elliott v. Piersol, 1 Pet. 328.....	231
Eltzroth v. Ryan, 89 Cal. 135.....	304
Empire Land & Canal Co. v. Engley, 18 Colo. 388.....	762
Erickson v. Stockton & T. C. R. Co., 148 Cal. 206.....	445
Fairechild v. Wall, 93 Cal. 401.....	38
Farley v. Reindollar, 174 Cal. 706.....	663
Farnum v. Clarke, 148 Cal. 615.....	179
Farrar v. Eash, 5 Ind. App. 238.....	792
Feeney v. Howard, 79 Cal. 525.....	265, 266
Ferri v. City of Long Beach, 176 Cal. 645.....	477
Fife, In re, 110 Cal. 8.....	607
Figg v. Mayo, 39 Cal. 265.....	309
First Nat. Bank v. Dutcher, 128 Iowa, 413.....	162
Fletcher v. McFarlane, 12 Mass. 43.....	431
Fletcher Collection Agency v. Superior Court, 31 Cal. App. 193..	99
Foley v. Martin, 142 Cal. 256, 260.....	310, 593
Ford v. Doyle, 37 Cal. 346.....	648
Foreman v. Hunter Lumber Co., 36 Cal. App. 763.....	173
Ft. Smith etc. Co. v. Pence, 122 Ark. 611.....	77
Foster v. Dugan, 8 Ohio, 87.....	231
Fragley v. Phelan, 126 Cal. 383.....	117, 475
Fredericks v. Tracy, 98 Cal. 658.....	338
Freeborn v. Norcross, 49 Cal. 313.....	794, 795
Freeman v. Barnum, 131 Cal. 386.....	514
French v. Barber Asphalt Paving Co., 181 U. S. 324.....	690
Fricker v. Americus Mfg. Co., 124 Ga. 165.....	269
Friend v. Ralston, 35 Wash. 422.....	448
Fujise v. Los Angeles Ry. Co., 12 Cal. App. 207.....	397
Fulkerth v. County of Stanislaus, 67 Cal. 336.....	425
Galbraith v. Shasta Inn Co., 143 Cal. 97.....	363
Galland v. Galland, 44 Cal. 475.....	788
Gamble, Estate of, 166 Cal. 253.....	444
Gardiner v. Royer, 167 Cal. 238.....	339
Garretson v. Pacific Crude Oil Co., 146 Cal. 184.....	460
Gavitt v. Doub, 23 Cal. 78.....	554
Gibson, In re, 75 Cal. 329.....	50
Gillespie v. McGowan, 100 Pa. St. 144.....	635
Gilliam v. Brown, 116 Cal. 454.....	536
Girvin v. Simon, 127 Cal. 491.....	663
Gitler v. Russian Co., 124 App. Div. 273.....	505

Gladding, McBean & Co. v. Montgomery, 20 Cal. App. 279.....	70
Glenn v. Rice, 174 Cal. 269.....	322, 323
Glide v. Superior Court, 147 Cal. 30.....	426
Glock v. Howard etc. Co., 123 Cal. 10.....	234
Gonsalves v. Petaluma etc. Ry. Co., 173 Cal. 264.....	44
Gordan, Ex parte, 92 Cal. 478.....	787
Gordan v. Buckles, 92 Cal. 481.....	787
Gordon v. Commonwealth, 141 Ky. 461.....	726
Gray v. Burr, 138 Cal. 109.....	663
Gray v. Hawes, 8 Cal. 562.....	648
Gray v. Maier etc. Brewery, 2 Cal. App. 653.....	565
Great Western Power Co. v. Pillsbury, 170 Cal. 180.....	727, 806
Green v. Soule, 145 Cal. 96.....	708
Greenall, Ex parte, 153 Cal. 767.....	604
Greenberg v. California Bituminous Rock Co., 107 Cal. 667.....	461
Griffin v. San Pedro etc. R. Co., 170 Cal. 772, 776.....	78, 400
Growall v. Pacific Surety Co., 21 Cal. App. 185.....	763
Grundel v. Union Iron Works, 141 Cal. 564.....	632
Gunn v. Bank of California, 99 Cal. 349.....	714
Haggin v. Raymond, 67 Cal. 302.....	276
Hale Bros. v. Milliken, 142 Cal. 137.....	131
Hall v. Beymer, 22 Colo. App. 271.....	315
Hallock v. Jaudin, 34 Cal. 167.....	577
Hamblin v. Dinneford, 2 Edw. Ch. (N. Y.) 529.....	178, 179
Hamilton v. Bates, 4 Cal. Unrep. 371.....	485
Hamilton v. Bell, 123 Cal. 93.....	733, 734
Hamm v. City of San Francisco, 17 Fed. 119.....	367
Hammond v. Starr, 79 Cal. 556.....	131
Hancock v. Board of Education, 140 Cal. 554.....	643
Hargreaves v. Deacon, 25 Mich. 1.....	635
Harnish v. Bramer, 71 Cal. 155.....	488
Harris v. Smith, 132 Cal. 316.....	795
Harrison v. Russell, 12 Idaho, 624.....	162
Hasley v. Ensley, 40 Ind. App. 598.....	497
Hathaway v. Davis, 33 Cal. 161.....	131
Hatton v. Gregg, 4 Cal. App. 537.....	618
Haugawout v. Percival, 161 Cal. 491.....	760
Hawley v. Harrington, 152 Cal. 188.....	304
Healey v. Visalia R. R. Co., 101 Cal. 593.....	385
Hellman v. Shoulters, 114 Cal. 156.....	475
Henne v. Summers, 23 Cal. App. 763.....	768
Herbert v. Southern Pac. Co., 121 Cal. 227.....	78
Herd v. Tuohy, 133 Cal. 55.....	57, 58, 59
Herman v. Santer, 103 Cal. 524.....	577
Herzog v. Hemphill, 7 Cal. App. 116, 118.....	202, 632
Hiatt v. Parker, 29 Kan. 765.....	130
Hickey v. Coschina, 133 Cal. 81.....	552, 795
Higgins v. San Diego Water Co., 118 Cal. 524.....	340
Hill v. Bacon, 43 Ill. 477.....	85
Hill v. Finnigan, 54 Cal. 493.....	672
Hinkle v. Sage, 67 Ohio St. 256.....	210
Hohenshell v. South Riverside L. & W. Co., 128 Cal. 627.....	338
Holmes v. Marshall, 145 Cal. 780.....	314, 317
Hooper v. McDade, 1 Cal. App. 733.....	59
Hopkins v. Clemson College, 221 U. S. 636.....	307
Hopkins v. Warner, 109 Cal. 133.....	695
Horne v. Minneapolis etc. R. R. Co., 62 Minn. 71.....	397
Hornung v. McCarthy, 126 Cal. 17.....	690

Houck v. Little River Drainage District, 239 U. S. 266.....	691
Houghton v. Dickson, 29 Cal. App. 321.....	173
Howard v. Valentine, 20 Cal. 282.....	360
Hubbard v. Jurian, 35 Cal. App. 757.....	87, 648
Hughes Mfg. & Lumber Co. v. Hathaway, 174 Cal. 48.....	536, 537
Hull v. Prairie Queen Mfg. Co., 92 Kan. 538.....	161, 162
Hunt v. Ward, 99 Cal. 612.....	339
Husheon v. Kelley, 162 Cal. 656.....	225
Hutson v. Southern California Ry. Co., 150 Cal. 703.....	78
Iburg v. Fitch, 57 Cal. 189.....	361
Iardi v. Central Cal. Traction Co., 36 Cal. App. 488.....	396
Indianapolis Cabinet Co. v. Herrman, 7 Ind. App. 462.....	798
International Text Book Co. v. Wessinger, 160 Ind. 349.....	377
Irwin v. County of Yuba, 119 Cal. 686.....	525
Jack v. Baldez, 97 Cal. 91.....	578
Jahns v. Nolting, 29 Cal. 508.....	375
James, In re, 99 Cal. 374.....	576
Janin v. London & S. F. Bank, 92 Cal. 14.....	747
Jauman v. McCusick, 166 Cal. 517.....	714
Jennings v. Alaska Treadwell G. M. Co., 170 Fed. 146.....	137
Jennings v. Dockham, 99 Mich. 253.....	231
Jennings v. Jordan, 31 Cal. App. 335.....	338
Jessen v. Peterson, Nelson & Co., 18 Cal. App. 350.....	718
Johnson v. Chely, 43 Cal. 299.....	223
Johnson v. Polhemus, 99 Cal. 240.....	129
Jordan v. Grover, 99 Cal. 194.....	256
Justice v. Robinson, 142 Cal. 199.....	691
Kearny, Ex parte, 55 Cal. 212.....	604
Keating, Estate of, 158 Cal. 109.....	578
Kellogg v. Pacific Box Factory, 57 Cal. 327.....	249
Kelly v. McKibben, 54 Cal. 192.....	795
Kennedy v. Board of Education, 82 Cal. 483.....	597
Kennedy v. Chase, 119 Cal. 642.....	632
Kiewit v. Carter, 25 Neb. 460.....	448
Killian v. Killian, 10 Cal. App. 312.....	766
King v. Meyer, 35 Cal. 646.....	555
Kingsbury's Case, 106 Mass. 223.....	572
Klamath Lumber Co. v. Co-operative Land & T. Co., 25 Cal. App. 678.....	145
Klix v. Nieman, 68 Wis. 271.....	635
Klokke v. Raphael, 8 Cal. App. 1.....	768
Knudson v. Kearney, 171 Cal. 250.....	443
Kohler v. Agassiz, 99 Cal. 9.....	131
Kowalsky, In re, 73 Cal. 120.....	604
Krause v. Sacramento, 48 Cal. 221.....	303
Kresin v. Mau, 15 Minn. 119.....	85
Lally v. Kuster, 177 Cal. 783.....	19
Lamont v. Solano County, 49 Cal. 158.....	529
Lane & Bodley Co. v. Jones, 79 Ala. 156.....	538
Larkin v. Superior Court, 171 Cal. 719.....	736
Law v. San Francisco, 144 Cal. 384.....	643
Learned v. Castle, 67 Cal. 41.....	276
Leather Manufacturers' Bank v. Morgan, 117 U. S. 96.....	748
Lee, Ex parte, 177 Cal. 690.....	651, 656
Lehman, Durr & Co. v. Robinson, 59 Ala. 219.....	497

Lehnhardt v. Jennings, 119 Cal. 199.....	131
Lennon, Estate of, 152 Cal. 327.....	50
Levee District v. Farmer, 101 Cal. 178.....	806
Leviston v. Swan, 33 Cal. 480.....	57, 59
Lewis v. Lewis, 174 Cal. 336.....	191
Lichtenstein, Ex parte, 67 Cal. 359.....	379
Lick v. Anderson, 29 Cal. App. 491.....	695
Lillie v. Clark etc. Const. Co., 37 Cal. App. 815.....	35
Lininger v. San Francisco etc. R. Co., 18 Cal. App. 411.....	397
Linn County Bank v. Hopkins, 47 Kan. 582.....	85
Liver v. Mills, 155 Cal. 459.....	740
Livestock etc. Co. v. Union etc. Co., 114 Cal. 147.....	795
Loehr v. Board of Education, 12 Cal. App. 671.....	597
Loftus v. Dehail, 133 Cal. 214.....	637
Los Angeles v. Dehail, 97 Cal. 13.....	474
Los Angeles School Dist. v. Longden, 148 Cal. 380.....	642
Loustalot v. McKeel, 157 Cal. 640.....	369
Loveland v. Alvord Min. Co., 76 Cal. 562.....	733
Lowell v. Lowell, 55 Cal. 316.....	173
Luitweiler Pumping Engine Co. v. Ukiah W. & I. Co., 16 Cal. App. 198.....	162, 163
Lumley v. Wagner, 1 De Gex, M. & G. 604.....	177
MacNeil v. Ward, 2 Cal. Unrep. 174.....	59
Mahoney v. Braverman, 54 Cal. 565.....	663
Main v. Casserly, 67 Cal. 127.....	339
Mandeville Mills v. Dale, 2 Ga. App. 607.....	632
Manning v. Franklin, 81 Cal. 205.....	225
Mansfield v. Chambers, 26 Cal. App. 499.....	641
Marks, In re, 45 Cal. 199.....	528
Marshall v. Ferguson, 23 Cal. 69.....	63
Martin v. Des Moines etc. Light Co., 131 Iowa, 724.....	46
Martin v. Superior Court, 176 Cal. 289.....	507
Maryland Brick Co. v. Dunkerly, 85 Md. 199.....	538
Masonic Benefit Assn. v. First State Bank, 99 Miss. 610.....	753
Mattingly v. Pennie, 105 Cal. 514.....	210, 492
Maxwell v. Fire Commissioners, 139 Cal. 229.....	498
Maze v. Gordon, 96 Cal. 61.....	722
Mazitelli v. Crane, 35 Cal. App. 264.....	736
McAllister v. Hamilton, 83 Cal. 861.....	414
McAneny v. Superior Court, 150 Cal. 6.....	670
McBride v. Newlin, 129 Cal. 86.....	427
McCaull v. Braham, 16 Fed. 37.....	177
McClain v. Hutton, 131 Cal. 148.....	498
McCormick Harvester Machine Co. v. Dodkins, 24 Ky. Law Rep. 2306.....	162
McDonald v. Bear River etc. M. Co., 13 Cal. 220.....	555
McDonald v. Porsh, 136 Cal. 301.....	754
McDonough v. Nowlin, 17 Cal. App. 45.....	342
McFarland v. McCowen, 98 Cal. 329.....	426
McGinn v. Rees, 33 Cal. App. 291.....	576
McGraw v. Kerr, 23 Colo. App. 163.....	173
McKee v. Cunningham, 2 Cal. App. 684.....	722
McMullin, Matter of, 164 Cal. 501.....	191
McNeil v. Kreda, 31 Cal. App. 76.....	235
Means v. Southern California Ry. Co., 144 Cal. 473.....	202, 632
Meek v. Southern California Ry. Co., 7 Cal. App. 606.....	304, 305
Merchants' Collection Agency v. Gopcevic, 23 Cal. App. 216.....	445
Miller, Matter of, 162 Cal. 637.....	374, 379



Miller v. Steen, 30 Cal. 407.....	739
Miranda, Ex parte, 73 Cal. 365.....	604
Mitchell v. Beckman, 64 Cal. 117.....	461
More v. More, 133 Cal. 489.....	514
Morgan v. Hugg, 5 Cal. 409.....	494, 555
Morgan v. United States Mortgage & T. Co., 208 N. Y. 218...	748, 750
Morrill v. Nightingale, 93 Cal. 452.....	90
Morris v. Allen, 17 Cal. App. 634.....	795
Moss v. Smith, 171 Cal. 777.....	692
Mott v. Smith, 16 Cal. 534.....	494
Murphy v. Stelling, 8 Cal. App. 702.....	129, 593
Myers v. Southwestern Nat. Bank, 193 Pa. St. 1.....	750
Myers v. Steel Machine Co., 67 N. J. Eq. 300.....	177
Nathan v. Porter, 36 Cal. App. 356.....	172
National Lumber Co. v. Kennedy, 28 Cal. App. 780.....	537
Nowbery v. James, 2 Mer. 446.....	179
Newlove v. Pond, 130 Cal. 342.....	338
Nelson v. Van Bonnhorst, 29 Pa. St. 352.....	505
Norris v. Lilly, 147 Cal. 754.....	225
North Alaska Salmon Co. v. Pillsbury, 174 Cal. 1.....	135
North Alaska Salmon Co. v. Pillsbury, 51 Cal. Dec. 473.....	134
North British & M. Ins. Co. v. Crutchfield, 108 Ind. 518.....	161
Norton v. Bassett, 154 Cal. 411.....	170
Onkland v. Oakland Waterfront Co., 118 Cal. 160.....	616
Oberlander v. Fixen Co., 129 Cal. 690.....	335
O'Connor v. Irvine, 74 Cal. 435.....	272
O'Dea v. Hollywood Cemetery Assn., 154 Cal. 53.....	338
Odell v. Cox, 151 Cal. 70.....	674
O'Hale v. Sacramento, 48 Cal. 212.....	303
Osborne v. Home Life Ins. Co., 123 Cal. 610.....	137
Osburn v. Stone, 170 Cal. 484.....	475
Otis Elevator Co. v. First Nat. Bank, 163 Cal. 31.....	746, 747, 748
Overholt v. Vieths, 93 Mo. 422.....	635
Owen v. Pomona L. & W. Co., 124 Cal. 331.....	670
Pacific Carbonator Co. v. Haydes, 26 Cal. App. 607.....	739
Pacific Tel. & Tel. Co. v. Eshleman, 166 Cal. 640.....	65
Page v. Fowler, 39 Cal. 412.....	794
Paine v. San Bernardino V. T. Co., 143 Cal. 654.....	354, 545, 570
Pajaro Valley Bank v. Scurich, 7 Cal. App. 732.....	131
Park v. Pacific Fire E. Co., 37 Cal. App. 112.....	475
Parker v. Norfolk etc. Ry. Co., 119 N. C. 677.....	130
Parker v. Reay, 76 Cal. 103.....	701
Parmenter v. McDougall, 172 Cal. 306.....	397
Pearsall v. Great Northern Ry., 161 U. S. 673.....	692
Peerless Machine Co. v. Gates, 61 Minn. 124.....	792
People v. Barbiero, 33 Cal. App. 770.....	423
People v. Boggs, 178 Cal. 79.....	90, 809
People v. Belden, 37 Cal. 51.....	435
People v. Bond, 13 Cal. App. 175.....	584
People v. Botkin, 132 Cal. 232.....	438
People v. Buckley, 143 Cal. 392.....	335
People v. Camp, 26 Cal. App. 385.....	809
People v. Chaves, 122 Cal. 131.....	582
People v. Chavez, 103 Cal. 408.....	582
People v. City of Los Angeles, 154 Cal. 220.....	86
People v. Coffey, 161 Cal. 433.....	5

People v. Cord, 157 Cal. 582.....	124
People v. Dabner, 25 Cal. App. 630.....	781
People v. Disperati, 11 Cal. App. 469.....	124
People v. Dole, 122 Cal. 486.....	583, 584
People v. Fellows, 122 Cal. 233.....	582
People v. Glaze, 139 Cal. 154.....	782
People v. Gonzales, 36 Cal. App. 782.....	783, 784
People v. Griesheimer, 176 Cal. 44.....	104, 105, 106
People v. Harrison, 107 Cal. 541.....	648
People v. Hulbert, 71 Cal. 72.....	690
People v. Lee, 34 Cal. App. 702.....	125
People v. Lee Gam, 69 Cal. 552.....	582
People v. Los Angeles, 133 Cal. 338.....	806
People v. Love, 29 Cal. App. 521.....	801
People v. Mathews, 139 Cal. 527.....	809
People v. McCrea, 32 Cal. 98.....	801
People v. McKamy, 168 Cal. 531.....	528
People v. McMahon, 124 Cal. 436.....	783
People v. Mendosa, 178 Cal. 509.....	784
People v. Milner, 122 Cal. 171.....	618
People v. Molina, 126 Cal. 505.....	783
People v. Monteith, 73 Cal. 9.....	187
People v. Oates, 142 Cal. 12.....	439
People v. O'Donnell, 37 Cal. App. 192.....	191, 192
People v. O'Neill, 51 Cal. 91.....	663
People v. Pera, 36 Cal. App. 292.....	186, 187
People v. Philbon, 138 Cal. 530.....	801
People v. Sanford, 43 Cal. 32.....	188
People v. Schlott, 162 Cal. 347.....	192
People v. Soeder, 150 Cal. 12.....	783
People v. Turley, 50 Cal. 469.....	582
People v. Weber, 149 Cal. 325.....	783
People v. Wheeler, 65 Cal. 77.....	783
People v. Winkler, 174 Cal. 133.....	813
People v. Yec, 37 Cal. App. 579.....	653, 654
People v. Yee Foo, 4 Cal. App. 730.....	783
Perine v. Lewis, 128 Cal. 236.....	39
Perkins v. Blauth, 163 Cal. 782.....	307
Perkins v. State, 124 Ga. 6.....	122
Perry v. Washburn, 20 Cal. 318.....	690
Peters v. Bowman, 115 Cal. 345.....	629, 634, 636, 637
Peterson v. McDonald, 13 Cal. App. 644.....	179
Peterson v. Walter A. Wood Mowing etc. M. Co., 97 Iowa, 148... 161	
Phelan v. Gardner, 43 Cal. 311.....	71
Phelps v. Owen, 11 Cal. 25.....	793, 794
Phillips v. Huffaker, 35 Cal. App. 531.....	492
Phoenix Mut. Life Ins. Co. v. Hinesley, 75 Ind. 1.....	161
Piercy v. Crandall, 34 Cal. 834.....	368
Pinkiert v. Kornblum, 5 Cal. App. 522.....	131
Pitsinowsky v. Beardsley, 37 Iowa, 9.....	162
Pittsburgh etc. Ry. Co. v. Ruby, 38 Ind. 294.....	161
Plumer v. Mayhew, 17 Cal. App. 223.....	589
Porter v. Anderson, 14 Cal. App. 716.....	19
Porter v. Bucher, 98 Cal. 454.....	551
Potts Drug Co. v. Benedict, 156 Cal. 322.....	469
Prewett v. Dyer, 107 Cal. 154.....	492
Prince v. Kennedy, 3 Cal. App. 498.....	590
Proulx v. Sacramento Valley etc. Co., 19 Cal. App. 529.....	721, 722
P. T. Walton Lumber Co. v. Cox, 29 Okl. 237.....	538
Pyle v. Clark, 75 Fed. 644.....	396

Ramish v. Hartwell, 126 Cal. 443.....	758
Randall v. Elder, 12 Kan. 257.....	85
Ransome-Crummey Co. v. Woodhams, 29 Cal. App. 356.....	498
Rauer v. Hertweck, 175 Cal. 278.....	674
Reardon v. San Francisco, 66 Cal. 492.....	306, 307, 308
Reclamation District v. Bonbini, 158 Cal. 206.....	688
Reclamation District No. 7 v. Sherman, 11 Cal. App. 407.....	690
Redding etc. Min. Co. v. National Surety Co., 18 Cal. App. 488..	19
Reed v. Bank of Ukiah, 148 Cal. 96.....	488
Reed Orchard Co. v. Superior Court, 19 Cal. App. 648.....	672
Reggel, Ex parte, 114 U. S. 642.....	572
Reinhart v. Lugo, 86 Cal. 398.....	577
R. H. Herron Co. v. Shaw, 165 Cal. 668.....	353
Rich v. Keyser, 54 Pa. St. 86.....	497
Richards v. Connell, 45 Neb. 467.....	635
Richards v. District School Board, 78 Or. 621.....	597
Richardson v. Thomas, 28 Ark. 387.....	505
Richmond v. Superior Court, 9 Cal. App. 62.....	223
Rigby v. Superior Court, 162 Cal. 339.....	678
Robbins v. Omnibus Railroad, 32 Cal. 472.....	498
Roberts v. Reilly, 116 U. S. 80.....	572
Robinson v. American Fish etc. Co., 17 Cal. App. 212.....	244
Robinson v. Western Pacific R. R. Co., 48 Cal. 409.....	77
Robison v. Mitchel, 159 Cal. 586.....	536, 537
Robson v. Superior Court, 171 Cal. 588.....	570
Rocca v. Boyle, 166 Cal. 94.....	425
Rogers v. Superior Court, 158 Cal. 467.....	672
Romero v. Snyder, 167 Cal. 216.....	736
Rooney v. Gray Bros., 145 Cal. 753.....	302, 561
Rosenblat v. Perkins, 18 Or. 156.....	352
Rowe v. Yuba County, 17 Cal. 62.....	529
Ruiz v. Santa Barbara Gas etc. Co., 164 Cal. 188.....	132
Ryan v. Altschul, 103 Cal. 174, 177.....	41, 701
Ryan v. North Alaska Salmon Co., 153 Cal. 438.....	137
Ryder v. Bamberger, 172 Cal. 791.....	618
Salisbury v. Shirley, 66 Cal. 223.....	430
St. Louis etc. R. R. Co. v. Paul, 173 U. S. 409, affirming 64 Ark. 83 .....	378
Sandwich Mfg. Co. v. Feary, 22 Neb. 53.....	162
San Francisco v. Pixley, 21 Cal. 56.....	672
San Joaquin Irr. Co. v. Stevenson, 26 Cal. App. 274.....	618
San Joaquin L. & W. Co. v. West, 99 Cal. 345.....	141
Sannoner v. Jacobson & Co., 47 Ark. 31.....	130
Sanquirico v. Benedetti, 1 Barb. (N. Y.) 315.....	179
Santa Rosa Nat. Bank v. Barnett, 125 Cal. 407.....	339
Saversnick v. Schwarzhild, 141 Mo. App. 509.....	46
Scammon v. Bonslett, 118 Cal. 93.....	57
Schiffman v. Peerless etc. Co., 13 Cal. App. 600.....	592
Schmidt v. Bauer, 80 Cal. 565, 567.....	202, 632
Schneider v. Market St. Ry. Co., 134 Cal. 490.....	398
Schnittger v. Rose, 139 Cal. 656.....	361, 568
Schwartz v. Knight, 74 Cal. 432.....	539
Scott v. Hollywood Park Co., 176 Cal. 680.....	476
Seals v. Davis, 25 Cal. App. 68.....	235
Security Loan & T. Co. v. Estudillo, 134 Cal. 166.....	667
Shearman v. Jorgensen, 106 Cal. 483.....	19
Shepard, In re, 35 Cal. App. 492.....	346, 348, 349
Shepard, Matter of, 161 Cal. 171.....	628

<i>Sievers v. San Francisco</i> , 115 Cal. 648.....	305, 307
<i>Silica Brick Co. v. Winsor</i> , 171 Cal. 18.....	354
<i>Silvia, Ex parte</i> , 123 Cal. 293.....	788
<i>Simmons v. Superior Court</i> , 30 Cal. App. 252.....	677, 678
<i>Smith v. Taylor</i> , 82 Cal. 533.....	601
<i>Southern California etc. Assn. v. Bustamante</i> , 52 Cal. 192.....	722
<i>Southern Const. Co. v. Howells</i> , 21 Cal. App. 330.....	603
<i>Southern Pac. Co. v. Edmunds</i> , 168 Cal. 415.....	513
<i>Southern Pac. Co. v. Superior Court</i> , 167 Cal. 250.....	670
<i>Southern Ry. Co. v. Fulford</i> , 125 Ga. 103.....	318
<i>South Knoxville Brick Co. v. Empire State Surety Co.</i> , 126 Tenn. 402.....	544
<i>South San Bernardino Land etc. Co. v. San Bernardino Nat. Bk.</i> , 127 Cal. 245.....	272
<i>Spangler v. San Francisco</i> , 84 Cal. 12.....	306, 307
<i>Spivok v. Independent Sash etc. Co.</i> , 173 Cal. 438.....	46
<i>Spreckels v. Hawaiian Com. etc. Co.</i> , 117 Cal. 377.....	178
<i>Sprigg v. Barber</i> , 122 Cal. 573.....	555
<i>Springfield Engine &amp; T. Co. v. Kennedy</i> , 7 Ind. App. 502.....	160
<i>Spring Valley Water Works v. Drinkhouse</i> , 92 Cal. 528.....	622
<i>Spurrier v. Neumiller, etc.</i> , 37 Cal. App. 683.....	818
<i>Spurrier v. Reclamation District</i> , 172 Cal. 157.....	686
<i>Standard Oil Co. v. Slye</i> , 164 Cal. 435.....	339
<i>Stapp v. Madera Canal &amp; Irr. Co.</i> , 34 Cal. App. 41.....	398
<i>State v. Aldersen</i> , 49 Mont. 414.....	477
<i>State v. Brown etc. Mfg. Co.</i> , 18 R. I. 16.....	378, 379
<i>State v. Clausen</i> , 65 Wash. 156.....	376
<i>State ex rel. McGrade v. District Court</i> , 52 Mont. 371.....	528, 530
<i>Stendal v. Boyd</i> , 73 Minn. 56.....	637
<i>Stephan, Ex parte</i> , 170 Cal. 48.....	379
<i>Stephens v. Pennsylvania Casualty Co.</i> , 3 Ann. Cas. 478, note....	448
<i>Stepp v. Frampton</i> , 179 Pa. St. 284.....	268
<i>Stimson v. Los Angeles Traction Co.</i> , 141 Cal. 32.....	538
<i>Stocks v. State</i> , 91 Ga. 831.....	124
<i>Stockton v. Board of Education</i> , 145 Cal. 246.....	597
<i>Stoddard v. Treadwell</i> , 29 Cal. 281.....	555
<i>Stoff v. Erken</i> , 172 Cal. 481.....	697
<i>Sullivan v. Huidekoper</i> , 27 App. D. C. 154.....	637
<i>Swift v. Board of Supervisors</i> , 16 Cal. App. 72.....	805, 806
<i>Taber v. Piedmont Heights Bldg. Co.</i> , 25 Cal. App. 230.....	386
<i>Tally v. Ganahl</i> , 151 Cal. 418.....	768
<i>Teller v. Bay etc. Dredging Co.</i> , 151 Cal. 209.....	94
<i>Tennant v. Tennant</i> , 167 Cal. 570.....	51
<i>Thomas, In re</i> , 33 Cal. App. 547.....	474
<i>Thomas v. German Gen. etc. Soc.</i> , 168 Cal. 183.....	312
<i>Thomas v. Joplin</i> , 14 Cal. App. 662.....	497
<i>Thomas v. Wentworth Hotel Co.</i> , 16 Cal. App. 403.....	354
<i>Thomas v. Whitney</i> , 186 Ill. 225.....	269
<i>Thompson v. California Const. Co.</i> , 148 Cal. 35.....	44
<i>Thompson v. Los Angeles &amp; S. D. B. Ry. Co.</i> , 165 Cal. 748.....	396
<i>Thompson v. United States</i> , 202 Fed. 401.....	346
<i>Thomson v. Bettens</i> , 94 Cal. 82.....	485
<i>Tilton v. Russek</i> , 171 Cal. 731.....	759
<i>Tooley, Estate of</i> , 170 Cal. 164.....	203
<i>Toomey v. Southern Pac. R. R. Co.</i> , 86 Cal. 374.....	204
<i>Torsley v. Pacific Elec. Ry. Co.</i> , 166 Cal. 457.....	398
<i>Treadwell, In re</i> , 114 Cal. 24.....	349
<i>Truett v. Adams</i> , 66 Cal. 218.....	367

Trumpler v. Cotton, 109 Cal. 257.....	386
Tucker v. Heniker, 41 N. H. 323.....	723
Turner, Ex parte, 75 Cal. 226.....	604
Tyler v. Tehama County, 109 Cal. 618.....	306, 307
Union Investment Co. v. F. M. Landon Co., 32 Cal. App. 305....	25
United States F. & G. Co. v. Industrial Acc. Commission, 174 Cal. 616.....	709
Vallejo etc. R. R. Co. v. Reed Orchard Co., 169 Cal. 545.....	560, 618
Vance v. Fore, 24 Cal. 435.....	616
Victors v. Kelsey, 31 Cal. App. 796.....	428
Vinson v. Los Angeles Pac. R. Co., 147 Cal. 479.....	589
Wakeman v. Wheeler & W. etc. Co., 101 N. Y. 205.....	593
Wall's Appeal, 111 Pa. St. 460.....	210
Wall v. Heald, 95 Cal. 364.....	578
Warren v. Riddell, 106 Cal. 352.....	305
Warring v. Freear, 64 Cal. 54.....	276
Watson v. San Francisco H. B. R. Co., 50 Cal. 523.....	304
Waugh v. Chauncey, 13 Cal. 11.....	806
Weisser v. Dennison, 10 N. Y. 68.....	747, 750
Welch v. Carlucci Stone Co., 215 Pa. St. 34.....	46
Welty v. Jacobs, 171 Ill. 624.....	177
Wentland v. Clark etc. Const. Co., 37 Cal. App. 34.....	35, 815
Western Indemnity Co. v. Pillsbury, 170 Cal. 686.....	375
Wetmore, In re, 99 Cal. 146, 151.....	643
White v. Soto, 82 Cal. 654.....	536
White v. Southern Pac. Co., 122 Cal. 305.....	77
Wilcox v. Engebretsen, 160 Cal. 288.....	806
Wild v. People, 227 Ill. 556.....	84
Willamette Steam Mills etc. Co. v. Los Angeles College Co., 94 Cal. 229.....	540
Williams v. McDonald, 58 Cal. 527.....	555
Williams v. Mountaineer Gold Min. Co., 102 Cal. 134.....	295
Williams v. Williams, 3 Mer. 160.....	179
Williamson v. Monroe, 174 Cal. 462.....	553
Wilson v. Puget Sound Co., 52 Wash. 522.....	396
Winterburn v. Chambers, 91 Cal. 170.....	304, 305
Wisconsin v. Powers, 191 U. S. 379.....	692
Witter v. Mission School District, 121 Cal. 351.....	700
Woods v. Potter, 8 Cal. App. 41.....	523
Woods Central Irr. D. Co. v. Porter Slough D. Co., 173 Cal. 149..	129
Woody v. Pairs, 35 Cal. App. 533.....	414
Yost v. Roux, 27 Cal. App. 307.....	539
Yule v. Bishop, 133 Cal. 574.....	342

## CITATIONS—VOL. 37.

### CALIFORNIA CONSTITUTION.

Art. I, sec. 7 .....	589
Art. I, sec. 11 .....	372
Art. I, sec. 13 .....	529
Art. I, sec. 14 .....	303
Art. I, sec. 15 .....	373
Art. I, sec. 16 .....	691
Art. IV, sec. 24 .....	115, 116
Art. IV, sec. 25, subd. 33.....	372
Art. VI, sec. 4 .....	649
Art. VI, sec. 4½ .....	105, 106, 188, 362, 560, 619
Art. IX, sec. 5 .....	640
Art. XI, sec. 6 .....	643
Art. XI, sec. 7½ .....	609
Art. XX, sec. 18 .....	596

### STATUTES.

1855, p. 23. Marysville Charter .....	639
1857, p. 40. Marysville Charter.....	639
1865-66, p. 69. Marysville Charter.....	639
1867-68, p. 716. Tide-lands .....	443
1869-70, p. 583. Marysville School Law.....	639, 640
1873-74, p. 153. Marysville School Law.....	639
1875-76, p. 149. Marysville Charter.....	639
1883, p. 93. Street Improvement .....	704
1885, p. 148. Street Improvement .....	703
1885, p. 155. Street Improvement .....	39
1885, pp. 160, 161. Street Improvement .....	119
1889, p. 70. Street Improvement.....	474, 476
1889, p. 162. Street Improvement.....	33
1889, p. 358. Municipal Corporations .....	80
1891, p. 54. Street Improvement .....	115
1891, p. 206. Survey .....	307
1893, p. 347. County Government.....	427
1899, p. 37. Municipal Corporations .....	80, 84
1899, p. 241. Civil Service .....	490
1905, p. 564. Street Improvement.....	116, 117
1909, p. 1018. Street Improvement .....	661, 664
1911, p. 599. Intoxicating Liquors .....	186
1911, p. 647. Reclamation Districts.....	686, 687, 689

## STATUTES—Continued.

1911, p. 730. Street Improvement .....	37, 38, 39, 41, 114, 115, 116, 117, 118, 660, 756, 757
1911, p. 733. Street Improvement .....	660
1911, p. 766. Street Improvement .....	115
1911, p. 768. Street Improvement .....	760
1911, p. 1661. Civil Service .....	500
1911, p. 1691. Street Improvement.....	703
1911, p. 1268. Wages .....	371, 372, 373
1911 (Ex. Sess.), p. 18. Public Utilities.....	64
1913, p. 20. "Red-light Abatement Act".....	416, 422
1913, p. 279. Workmen's Compensation .....	376
1913, p. 287. Workmen's Compensation .....	501, 502
1913, pp. 421, 429. Street Improvement .....	116
1913, p. 587. Municipal Corporations .....	80, 81, 84
1913, p. 648. Vehicles .....	719
1913, p. 715. "Blue Sky Law".....	255
1913, p. 1035. Civil Service .....	521
1913, p. 1602. Civil Service .....	520
1915, p. 30. Pleading .....	302
1915, pp. 201-207. Appeal .....	304
1915, p. 209. New Trial and Appeal.....	558
1915, p. 299. Wages.....	371, 372, 373
1915, p. 1085. Workmen's Compensation .....	501, 502
1915, p. 1225. Juvenile Court .....	102
1915, p. 1464. Street Improvement.....	660
1917, p. 404. Vehicles .....	603, 605
1917, p. 410. Vehicles .....	605
1917, p. 665. "Indeterminate Sentence" .....	783, 784
Deering's Gen. Laws, Act 2144a, sec. 12 [a] [3]. Workmen's Compensation .....	709
Deering's General Laws, p. 182. Civil Service.....	521
Deering's Gen. Laws 1915, p. 766. Juvenile Court.....	102

## CODE OF CIVIL PROCEDURE.

SECTION	PAGE	SECTION	PAGE
269 .....	531	427 .....	302
274 .....	531	430 .....	130
274a .....	531	437 .....	334
282 .....	349	442 .....	443
287 .....	346, 347, 348	473 .....	17, 18, 19, 27, 29, 127, 574, 576, 588, 650, 666
338 .....	341	475 .....	310, 560
340 .....	752	526 .....	178
343 .....	170	553 .....	733, 784
370 .....	754, 755	566 .....	697
377 .....	44	580 .....	129
426 .....	126, 128, 129		

## CODE OF CIVIL PROCEDURE—Continued.

SECTION	PAGE	SECTION	PAGE
581 .....	733	1159 .....	223, 359
583 .....	735, 736	1161 .....	225, 566, 567
631.....	586, 587, 588, 589	1162 .....	351, 568
648 .....	304	1167 .....	360, 564
650 .....	304	1173 .....	360
667.....	792, 794, 795, 796	1174 .....	360
670.....	558, 560, 578	1183 .....	87, 290,
671 .....	130	.....	294, 295, 296, 569, 647
690 .....	314, 318	1184 .....	648
694 .....	673	1187..	535, 536, 537, 539, 540, 762
700a .....	671	1190 .....	762, 763
726 .....	56, 57	1191 .....	296
732 .....	375	1227-1232 .....	337
733 .....	375	1664 .....	514
735 .....	375	1835 .....	283
946 .....	672, 733, 734	1854 .....	332
950 .....	558, 560	1856 .....	494
953a .....	304, 793	1858 .....	193
953c .....	200, 343,	1860 .....	494
.....	409, 445, 468, 511, 541, 542,	1870 .....	187
.....	544, 545, 570, 571, 737, 799	1903 .....	211
963 .....	333, 558	1908 .....	570
978a.....	96, 97, 98, 677, 678	1910 .....	570
981 .....	677	1911 .....	512
1033 .....	140	1973 .....	681
1035 .....	445	2047 .....	183
1049 .....	286	2061.....	78, 402, 492, 720

## CIVIL CODE.

SECTION	PAGE	SECTION	PAGE
138 .....	190	1559 .....	485
139 .....	190	1569 .....	90
196 .....	191	1570 .....	90
309 .....	337	1661 .....	470, 771
322 .....	338	1917 .....	386
761 .....	351	1918 .....	259
789 .....	351, 352	1920 .....	445, 795
790 .....	351	1943 .....	681
809 .....	443	1945 .....	681
1140 .....	771	1970 .....	44, 138
1141 .....	771	2273 .....	269
1313 .....	51	2275 .....	269
1411 .....	731	2300-2317 .....	243
1451 .....	64	2807 .....	256
1511 .....	24	3046 .....	460



## CIVIL CODE—Continued.

SECTION	PAGE	SECTION	PAGE
3144 .....	249, 250	3333 .....	795
3274 .....	178	3336 .....	792, 793, 795
3294 .....	795	3423 .....	178, 179
3306 .....	234	3440.....	547, 549, 551, 553

## PENAL CODE.

SECTION	PAGE	SECTION	PAGE
4 .....	197	771 .....	524, 528, 530
17 .....	347, 348	772 .....	528
27 .....	438, 439	802 .....	197, 198
31 .....	5, 6, 583	869 .....	414, 531
190 .....	653	928 .....	414
270...189, 191, 192, 193, 195, 196		954 .....	108
270a .....	195, 196	971 .....	5, 6, 583
270b .....	195, 196	987 .....	528, 529
288 .....	107, 108, 262, 778,	1105 .....	122
....779, 780, 781, 783, 800, 807		1111 .....	800
470 .....	439	1128 .....	123
508 .....	434	1159 .....	439
664 .....	439	1168 .....	651, 656, 78
682 .....	528	1203 .....	195, 196, 197, 198
758 .....	524, 528	1425 .....	605

## POLITICAL CODE.

SECTION	PAGE	SECTION	PAGE
795 .....	248, 249, 250	4075 .....	414
1576 .....	594	4076 .....	414
1609 .....	594	4078 .....	425
1617 .....	594, 595, 597, 641	4091 .....	413, 414
1793 .....	596, 597	4130 .....	412
1884 .....	642	4157 .....	734
2643 .....	803	4175 .....	608, 609
2681 .....	805	4176 .....	608, 609
2688 .....	804	4234 .....	412
3466 1/2, 685, 686, 687, 688, 689, 691		4307...414, 425, 525, 526, 532, 533	
3478 .....	689	4344 .....	525
4041 .....	425, 531		

## ALASKA.

Comp. Laws 1913, sec. 1185. Employers' Liability...135, 136, 137, 138  
 Sess. Laws 1913, c. 45, secs. 1, 4. Employers' Liability...135, 136, 138

## ARKANSAS.

Acts 1899, p. 76. Workmen's Compensation..... 378

## ENGLISH.

Lord Campbell's Act, 1846. Employers' Liability..... 137

## INDIANA.

Acts of 1899, c. 124. Workmen's Compensation..... 377

## KENTUCKY.

Stats. 1903, sec. 2739a, subsec. 1. Workmen's Compensation.... 378

## NEW YORK.

Field's Proposed Draft Civ. Code (1912)..... 178

## RHODE ISLAND.

Laws 1891, c. 918, sec. 1. Workmen's Compensation..... 378

## UNITED STATES.

Const., art. I, sec. 10. Obligation of Contract.....64, 691  
 Const., art. V. Property Rights..... 307  
 Const., art. VI. Civil Rights ..... 529  
 Const., art. XIV. Due Process of Law..... 372  
 Const., art. XIV, sec. 1. Obligations of Contracts..... 117  
 Rev. Stats., sec. 5278. "Fugitive from Justice"..... 572  
 Rev. Stats., sec. 5470. Disbarment .....344, 348  
 24 Stat. 379. Interstate Commerce ..... 64  
 35 Stat. 1152. Federal Penal Code, sec. 335..... 347  
 37 Stat. 518. Alaska Code ..... 135



**REPORTS OF CASES**  
**DETERMINED IN**  
**THE DISTRICT COURTS OF APPEAL**  
**OF THE**  
**STATE OF CALIFORNIA.**

---

[Crim. No. 428. Third Appellate District.—April 16, 1918.]

**THE PEOPLE, Respondent, v. AH GEE, Appellant.**

**CRIMINAL LAW—PRINCIPALS IN COMMISSION OF CRIME—**One who aids and abets in the commission of a crime, though not present when the act, the final step in its commission, is committed, is logically a principal, whatever may have been the character, nature, quality, or extent of the assistance contributed by him toward its consummation or the execution of the intent jointly formed by him and the actual perpetrator of the act to do the wrongful act.

**ID.—PRINCIPALS AND ACCESSORIES — DISTINCTION ABROGATED — CHARGE AND TRIAL OF ACCESSORY AS PRINCIPAL.**—The distinction existing at common law between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, has been abrogated, and all persons concerned in the commission of a felony are to be prosecuted, tried, and punished as principals, and no other facts need be alleged in any indictment or information against such an accessory than are required in an indictment or information against his principal.

**ID.—MURDER—DEFENDANT'S CONNECTION WITH CRIME—EVIDENCE—INCONSISTENT THEORIES — INSUFFICIENT GROUND FOR REVERSAL.** — Under an information charging the defendant jointly with two other persons of the crime of murder, without any attempt at describing how or in what manner the act was committed, or any allegation that the defendant was merely an aider and abetter of the crime, the prosecution was entitled to prove the charge by any testimony which would reveal the defendant's connection therewith, and the fact that there was testimony which tended to establish two different theories upon which the defendant may have been a participant in the commission of the crime, is no ground for reversal of the judgment.

APPEAL from a judgment of the Superior Court of San Joaquin County, and from an order denying a new trial. D. M. Young, Judge.

The facts are stated in the opinion of the court.

Ben Berry, D. P. Eicke, and Roy Bronson, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

HART, J.—Defendant and two others, Toy Lee and Foo Kee, were jointly charged, in an information filed by the district attorney of San Joaquin County, with the murder of one Lee Wun, in the city of Stockton, on March 21, 1917. Separate trials of the defendants were had and Ah Gee was convicted of the crime of murder of the first degree and was sentenced to imprisonment in the state prison for the term of his natural life. The appeal is from the judgment and from an order denying defendant's motion for a new trial.

The record discloses that Lee Wun met his death during a tong war. He and the three defendants above named were engaged in the shooting and Foo Kee testified that he was fired upon by one Lim Buck Hee.

There is but one point urged for a reversal and it is this: That the prosecution presented its case upon two distinct and inconsistent theories, to wit: 1. That the defendant aided, abetted, and assisted Toy Lee in the murder of Lee Wun; and 2. That Ah Gee himself actually killed and murdered said Lee Wun. In support of this proposition, appellant calls attention to the testimony of the witnesses, C. W. Potter and A. F. Peterson, who testified to having been eye-witnesses to the homicide and who gave testimony for the people.

Potter, a police detective of the city of Stockton, testified that he was in a store on East Market Street; that he heard shooting, went out of the store and saw three men in the street (the three defendants) shooting at Lee Wun; that as he looked out of the door he saw Ah Gee step up and fire two shots. The witness "hollered" at defendant, who turned and started to run west. Foo Kee fired a shot and ran east. Lee Wun was backing away and firing and Toy Lee kept ad-

vancing. At the final shot by Toy Lee the deceased fell to the ground. Witness said that after he saw Ah Gee and Foo Kee running away he gave all his attention to Toy Lee and Lee Wun and saw nothing more of defendant.

Peterson testified that he heard shots and saw Ah Gee shooting at a man who was running. He testified: "He was running and he was firing at him as he ran. He just had his gun out, all he had in his hand; he was bang, bang, bang, bang at this man. It seemed to me like when this man fell . . . defendant stopped and started to go down—he first started off at a walk, then he took a little dog trot. . . . I had my eye on nothing else but him and never took my eye off him till the minute he was caught." The witness said he saw no one but the defendant shooting and saw no other Chinaman with him.

According to the testimony of Potter, so the argument goes, the defendant, having fired two unavailing shots at the deceased and then ran away or disappeared from the scene of the homicide, merely aided, abetted, and assisted Toy Lee in the commission of the crime, while, on the other hand, according to the testimony of Peterson, the defendant actually fired the shot which produced the death of Lee Wun. Hence, so the argument proceeds, there were presented by the people two inconsistent theories of the part taken by the defendant in the commission of the crime, and this, it is claimed, is fatal to the result reached by the jury.

The position of the defendant, as above set forth, is not well taken.

Under the common law, a principal in the commission of a crime was of two degrees, viz.: 1. One who was the actual actor or absolute perpetrator of the crime, who was a principal in the first degree; 2. One who was present, actually or constructively, aiding and abetting the fact to be done, who was a principal in the same degree. (4 Cooley's Blackstone, 4th ed., p. 34.) One who, being absent at the time of the crime committed, procured, counseled, or commanded another to commit the crime, was an accessory before the fact, and under the common law it was necessary to prosecute, try, and punish him as such accessory and not as a principal. (Id., p. 37.) The distinction between a principal in the second degree and an accessory before the fact, it will be observed, was founded upon the presence or nonpresence at the com-

mission of the crime of the party aiding and abetting the actual perpetrator of the act which constituted the final consummation of the crime in its commission. Both, though, were nevertheless principals. However, the act of an accessory before the fact was treated by the common law as constituting a substantive offense, distinct from, though growing out of, the principal fact itself. A number of reasons are given by the learned English commentator why the distinction was maintained by the common law. Among these the most substantial from a present-day point of view was that the accused might know how to defend himself when indicted, "the commission of an actual robbery being quite a different accusation from that of harboring the robber." There are other reasons given for the distinction which are not at all germane to our system, as, for instance, the right of an accessory after the fact to claim the benefit of clergy, notwithstanding that the punishment prescribed to both principal and accessory, whether before or after the fact, was the same, the principal's offense not being clergyable. But there cannot logically be said to be less moral turpitude or a less or different degree thereof in the act of a person who, though not actually committing the act constituting the crime, and not present when it is committed, has actively, with the intent that it shall be committed, contributed to or aided and abetted, by advice or counsel or command or otherwise, in its commission, than there is in the act of the person who actually perpetrated the crime. Indeed, abstractly speaking, from no point of view can there be found any logical reason for the distinction. If A and B join in the formation of an intent to commit a crime and assign to each other different parts for the execution of that intent—one actually to perpetrate the act and the other to perform some other part which they conceive to be necessary to consummate the crime—how may it logically be said that the one is not equally a principal with the other? It is the execution of the joint criminal intent which constitutes the crime, and it is immaterial, so far as the degree of guilt is concerned, how or by whom of the two it is actually accomplished. If the one aids and abets in the commission of the crime, though not present when the act, the final step in its commission, is committed, he is logically a principal, whatever may have been the character, nature, quality, or extent of the assistance contributed

by him toward its consummation or the execution of the intent jointly formed by him and the actual perpetrator of the act to do the wrongful act.

Thus, undoubtedly, our legislature viewed the proposition and, therefore, by express mandate, has abrogated the mere formal distinction (and it was no more than this) existing at common law between principals in the commission of crimes and accessories before the fact, or those participating in their commission without actually perpetrating the acts which, with the intent, constitute the crime. Therefore, whatever may be the law in other jurisdictions, the rule in this state, as laid down by the legislature, is that "all persons concerned in the commission of a crime, whether it be felony or misdemeanor, *and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, . . . are principals in any crime so committed.*" (Pen Code, sec. 31.) Again, the rule, as promulgated by the legislature, is that "the distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated; and all persons concerned in the commission of a felony, *whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall hereafter be prosecuted, tried and punished as principals, and no other facts need be alleged in any indictment or information against such an accessory than are required in an indictment or information against his principal.*" (Pen. Code, sec. 971.)

Of course, there should be no confusion arising from the distinction existing between *accomplices* and accessories in crime. An accessory necessarily presupposes a principal in the very crime committed and at the same time he is an accomplice of the principal, while, on the other hand, "it is not a legal criterion of an accomplice that he must be indictable as principal for the same identical crime as that charged against the defendant on trial. He may have advised and encouraged that crime, and so be an accomplice therein, and yet be punishable as principal for an offense distinct therefrom, yet associated therewith, to which the law attaches a distinct punishment." (*People v. Coffey*, 161 Cal. 433, [39



L. R. A. (N. S.) 704, 119 Pac. 901].) In brief, an accessory is always an accomplice, while an accomplice is not necessarily or always an accessory in the commission of the crime in whose consummation he has aided and abetted.

Under our code sections, above quoted herein, an accessory is not only to be charged in the accusatory pleading as a principal, but is also to be *tried* as a principal; hence it is immaterial what the proof shows was the nature of the part that the accused took in the commission of the crime—that is, it is not a matter of material importance whether he is shown to have been the actual perpetrator of the criminal act or only aided and abetted in its commission. In either case, he is a principal, and it can make no difference in the proof of the charge what particular act he did or part he took in the execution of the criminal act that made him one.

In the present case, the defendant, jointly with two others, is charged in the information with the murder of Lee Wun. There is but one count in the information and that is the usual or common one by which murder, as defined by the law, is charged. There is no attempt at describing how or in what manner the act was committed or any allegation that the defendant was merely an aider and abettor of the crime, an allegation which is not required under our law. The prosecution was entitled to prove the charge by any testimony which would reveal the defendant's connection therewith. It happened that, while one of the witnesses presented by the people to support the charge testified that he saw the defendant fire a shot into the body of Lee Wun, another witness, likewise presented, testified that the accused fired a couple of shots at the deceased, which apparently failed of their mark, and then disappeared from the scene of the shooting. Even according to the common law, the defendant would be a principal under the testimony of the witness Potter. But the testimony of both witnesses was material, relevant, and competent, and, therefore, clearly admissible in any event as tending to prove the ultimate fact in issue, viz.: That the defendant killed and murdered Lee Wun. Indeed, the objection to the testimony on the ground that it tended to establish two different theories upon which the defendant might have been a participant in the commission of the crime does not go to the proposition that said testimony does not

show, or tend to show, the guilt of the accused of the crime charged but to the proposition that he was a party to the commission of the crime in two different ways. As we view the situation, the proposition is no different in principle from a case where one witness for the people had testified that the deceased had been killed by a blow with a club in the hands of and wielded by the defendant, while another witness for the people had testified that the death of the deceased had been produced by the defendant by means of a knife, the particular manner in which death was produced not being alleged in the indictment.

But, as stated, the people had the right to make the proof as it was made and leave to the judgment of the jury the question whether upon the whole the evidence was of sufficient probative force to warrant the conviction in their minds that, beyond a reasonable doubt, the defendant, whatever might have been the nature or extent of the part he might have taken in the commission of the act, was guilty as charged.

But, after all, we can see in this case nothing very much different from what is to be found in the large number of criminal cases which find their way to courts of appeal, for it may safely be said that there is rarely to be encountered a criminal case in which there is not to be found some conflict upon vital questions of fact between witnesses whose testimony is presented by the people in support of the charge. The same may be said to be true in some measure of witnesses whose testimony is offered in support of the defense. But the courts are not authorized to reverse the result reached at *nisi prius* because of such conflicts or because of inconsistencies or disparities in the testimony of any one witness. These are matters for the jury to resolve. That is one of their important functions. Nor will the courts reverse a case merely because, as is the claim here, the testimony presented to sustain a criminal charge tends to disclose two different and inconsistent theories of how the accused committed the act charged. Such a situation might affect the evidential strength of the people's case, but it involves a question solely for the jury's determination, unless it plainly appears that, upon the testimony as it is presented in the record up for review, both theories are inherently improbable. We may add that there would not be many criminal cases which could

escape the fate of a reversal if for such reasons courts of review were required to nullify the verdicts of juries.

The judgment and the order are affirmed.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 14, 1918.

---

[Civ. No. 2328. First Appellate District.—April 17, 1918.]

JOHN A. JORDAN, Respondent, v. COMBINED AMUSEMENTS COMPANY (a Corporation), Appellant.

**BROKER'S COMMISSION—SALE OF CORPORATION STOCK—LIABILITY OF CORPORATION TO SUBAGENT—FINDINGS UNSUPPORTED BY EVIDENCE.**—In this action against a corporation by the assignee of a subagent for his commission on sales of corporate stock of the defendant on an alleged agreement to make direct payment to such subagent, it is held that the evidence is insufficient to sustain the findings in favor of the plaintiff.

APPEAL from a judgment of the Superior Court of San Mateo County. Geo. H. Buck, Judge.

The facts are stated in the opinion of the court.

Walter R. Bacon, for Appellant.

Ross & Ross, for Respondent.

KERRIGAN, J.—This is an appeal from a judgment in favor of the plaintiff in an action against the defendant corporation for commissions on sales of its capital stock.

We think the judgment must be reversed on the ground that the evidence does not sustain the findings made in plaintiff's favor.

The facts of the case as disclosed by the record may be stated briefly as follows: F. W. Swanton had entered into a written contract with the defendant whereby he undertook

the sale of a certain number of shares of its capital stock, for which he was to receive twenty-five per cent of the receipts from such sales as a commission. He in turn entered into a written agreement with W. G. Loomis, plaintiff's assignor, wherein it was provided that Loomis would co-operate and assist Swanton in the sale of the stock, for which service Swanton would pay him one-half of his commissions. Under this last agreement sales of stock were made by Loomis, and Swanton had made one payment of commission to him, when they, being both officials of the company, Swanton being president and Loomis secretary, directed the bookkeeper of the defendant to keep the account of their sales and commissions in the books of the corporation. This was done, and, accordingly, when sales were made by either Swanton or Loomis they would each be credited with twelve and one-half per cent of the proceeds of the sales, and would be charged with the expenses incurred by them and with commissions paid by the corporation to subagents, and the balance due each when settled was paid by the defendant's check.

It is not shown, so far as the evidence discloses, that it was the understanding of any of the parties to the transaction that the corporation was to assume the obligation of Swanton to pay Loomis the commission due him on sales of stock, or that its obligation to Swanton under the contract first mentioned was modified. The course it pursued in making payments to Loomis was apparently with the consent of Swanton, and a natural consequence of the assumption by the corporation of the task of entering upon its books the sales of stock made under its contract with Swanton so as to show the state of the account between Swanton and Loomis. The latter on the witness-stand admitted that the corporation undertook the matter of bookkeeping merely as a convenience to Swanton and himself. It is true that the directors of the corporation knew that the commission accounts of Loomis and Swanton were being kept in the corporation's books, and it is true that Loomis testified that when he was pressing for payment of eleven thousand dollars due to him as commissions the directors promised payment as soon as the Panama-Pacific International Exposition opened, at which time the corporation, through the ownership of certain concessions in connection therewith, expected to be in daily receipt of sums

of money. But this testimony is entirely consistent with the theory that the corporation was handling the bookkeeping, and making payments directly to Loomis on account of commissions earned by him under his contract with Swanton as a matter of accommodation and convenience. In other words, the corporation in effect admitted that it owed the amount claimed to Swanton, and that under its arrangement with him, and the latter's arrangement with Loomis, it would, as soon as it was in possession of funds, pay each the amount due. After Loomis had received about eighteen thousand dollars in commissions and when he was pressing for payment of the balance due him, he accepted from Swanton an order drawn by the latter on the defendant, and which directed the defendant to pay to Loomis two thousand dollars and to charge the same to his personal account. This is a circumstance indicating that at that time the parties concerned regarded Swanton as the person primarily entitled to the commissions, and that he in turn was personally liable to Loomis for the proportion thereof to which he was entitled; and there is no evidence of any change in the relationship which Loomis bore to the corporation as regards this account, which would place his present claim on any different footing. Loomis also testified on cross-examination that the defendant employed an assistant bookkeeper at a salary of \$150 per month, whose salary was charged in equal parts to the commission accounts of himself and Swanton. From this additional circumstance the inference is quite plain that the defendant consented to keeping the commission accounts between Swanton and Loomis merely as a matter of accommodation to them, and the course pursued by the corporation in this respect in no manner affected its original obligation to pay Swanton alone the commissions due upon sales of its capital stock.

Since the taking of the appeal the parties have settled their differences with respect to a part of the amount recovered, to wit, the amount of the draft hereinbefore referred to and which was the subject matter of one of the counts of the complaint. Consequently as to that part of the judgment no action by this court is necessary. As to the remainder, for the reasons heretofore given the judgment is reversed.

Zook, J., *pro tem.*, and Beasley, J., *pro tem.*, concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on May 16, 1918, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 14, 1918.

---

[Civ. No. 2383. First Appellate District.—April 18, 1918.]

MARY BOND, Respondent, v. RUTH AICKLEY, Administratrix, etc., et al., Defendants; IRVING E. SMITH, Appellant.

ADVERSE POSSESSION—CONVEYANCE OF TITLE—SUBSEQUENT DEED FROM REMOTE OWNERS—INTEREST NOT ACQUIRED.—One who acquires title to real property by adverse possession and payment of taxes and then conveys it to another acquires no interest in the property under a later deed from the owners previous to his adverse possession, nor do his subsequent grantees acquire any interest.

APPEAL from a judgment of the Superior Court of Alameda County. T. W. Harris, Judge.

The facts are stated in the opinion of the court.

L. D. Manning, McKee & Tasheira, and Matt. Wahrhaftig, for Appellant.

F. A. Berlin, for Respondent.

BEASLY, J., *pro tem.*—This action to quiet title was begun on June 4, 1907, by the plaintiff Mary Bond against W. C. Aickley, James Miller, and Lydia A. Larue individually and as the administratrix of the estate of James Larue, deceased. On September 1, 1909, Aickley made a deed of the property in controversy to Irving E. Smith, after which Aickley died, and his widow Ruth, who had become his administratrix, and Smith, his grantee, were substituted in his stead as defendants. From the judgment in favor of the plaintiff, Smith appeals.

The action was once before appealed to the supreme court and reversed by that court (*Bond v. Aickley*, 168 Cal. 161, [141 Pac. 1188]). At the time of the first trial, from which

that appeal was taken, none of the parties attempted to de-  
raign title from any paramount source. Reference may be  
had to the opinion of the supreme court in that case for the  
facts as they appeared in the record at that time.

On the second trial the defendants attempted to show a  
paramount title derived by William C. Aickley subsequent  
to his deed to Annie Bond. This attempt was based upon  
two deeds to the property executed the one by Lydia A.  
Larue upon April 2, 1907, purporting to convey an undivided  
one-half of the property to Aickley, and the other by R. C.  
Corrigan, dated September 24, 1908, and purporting to con-  
vey the whole thereof to Aickley. The appellant claims that  
Lydia A. Larue and Corrigan, when they executed these deeds  
to Aickley, held the title to this property. The property  
is a part of a small tract thirty-seven and one-half feet wide  
at one end, and running down to a point apparently at the  
other, known to searchers of record in Alameda County as  
"No man's land." It is a portion of the rancho San Antonio,  
which was a Mexican grant made to Antonio Maria Peralta,  
confirmed by a patent of the United States dated September  
15, 1874. Previous to the patent the title to the strip of  
land, of which the little lot in controversy here formed a  
part, had been obscured and entangled by conveyances of  
parts of the ranch to many parties; and while we have exam-  
ined this record with care after the manner of a technical  
title attorney, and find that the title apparently did not at  
the time of their deeds to Aickley rest in either Mrs. Larue  
or Corrigan, we are not confronted with the necessity of  
determining that point, because the plaintiff's title seems to  
be supported by proof of adverse possession on the part of  
W. C. Aickley before he deeded to Mrs. Bond, coupled with  
the possession of Annie Bond, his grantee, and the plaintiff  
Mary Bond subsequent to that date and extending down to  
the time of filing the complaint in this action.

It appears that this strip of land was vacant in 1890; that  
there were no improvements thereon and no one was in pos-  
session thereof. About that time W. C. Aickley went upon  
the land, and between 1890 and 1892 he improved it by plac-  
ing a two-room house thereon. He retained possession of the  
property in person and by the improvements which he placed  
thereon until the year 1892, when he went to live with Annie  
Bond, and remained with her without paying any board for

five or six years. Evidently, feeling under obligations to her, Aickley on the sixteenth day of April, 1894, about three or four years after he took possession of the property, conveyed it to Annie Bond, and on the fifth day of February, 1895, Annie Bond quitclaimed the same to the plaintiff Mary Bond. During the years between the time when Aickley took possession of the property and the beginning of this action either Aickley or Annie Bond or Mary Bond maintained the house upon the premises, making various improvements of a substantial character thereon, occupying the house, and at times leasing the same to a tenant. While they were not always in actual, physical possession of the property by being actually personally located in the home, they did always claim title thereto, and always held the possession thereof so far as the acts above described show possession. There is no evidence that any other person ever had possession of the property during this period, and the evidence shows that some one of the parties was at various times and during most of this period in actual physical possession thereof, and that they claimed ownership of the property, Annie Bond and Mary Bond especially asserting title thereto at all times by reason of their deed from Aickley. The evidence of the various movements of this family is not perfectly co-ordinated; but it is sufficient to show an ownership claimed against the world, and a possession adverse to every person who might claim the property against them. Aickley and the Bonds evidently paid the taxes on the property during the years when they respectively occupied it and held and claimed to own it. From 1891 to 1897 the property was assessed to Samuel Lewis. The evidence shows that the plaintiff had the tax bills from 1892 down to 1900 consecutively. These tax bills were in the office of her attorney in San Francisco at the time of the great fire of 1906, and were badly damaged in that catastrophe; but they were produced in court, and this, in connection with other evidence as to the payment of the taxes, is sufficient to sustain the finding of the court that the taxes were paid by Annie Bond and the plaintiff. While the evidence upon the subject of the payment of taxes, and also upon the subject of adverse possession, is not as full as could be desired, it must be said, in passing upon the findings made by the court based upon this evidence, that often one of the most difficult things to prove



is the name of the person paying taxes, and that we can find no fault with the findings of the trial court upon these propositions. This being so, the after-acquired title of Aickley from Corrigan and Mrs. Larue was barred by the adverse possession of himself, and of Annie and Mary Bond thereafter, before this action was begun.

Judgment affirmed.

Kerrigan, J., and Zook, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 17, 1918.

---

[Civ. No. 1835. Third Appellate District.—April 19, 1918.]

PENRYN LAND COMPANY (a Corporation), Appellant,  
v. M. B. AKAHORI, as Administrator, etc., Respondent.

**DEFAULT JUDGMENT—ORDER VACATING—APPEAL—ATTITUDE OF APPELLATE COURT.**—Appellate courts are strongly inclined to uphold an order vacating a default judgment on the ground of mistake and excusable neglect if there be found in the record any legal justification for the action of the trial court.

**ID.—INNOCENT PURCHASER—NECESSITY FOR SUBSTANTIAL EVIDENCE.**—When, however, the orderly processes of law have been followed, and a judgment regularly obtained, there must be some substantial evidence received to excuse in a legal sense the inaction of the defendant before the court will be justified in setting at naught its prior determination, especially where an innocent purchaser relying upon the validity of the judgment has acquired the property for a valuable consideration.

**ID.—ACTION AGAINST ADMINISTRATOR—FAILURE TO READ PROCESS—DELIVERY TO ATTORNEY FOR ESTATE—VACATION OF DEFAULT UNWARRANTED.**—Where an administrator was served with a copy of the complaint and summons in an action to quiet title to property of his intestate, and, being very busy, merely glanced at the paper without reading it, and seeing that it pertained to the estate, left it on the desk of the attorney, there was no excusable neglect or mistake on the part of the administrator to justify the vacation of the default judgment taken against him.

**ID.—FAILURE TO EXPLAIN DEFENSE TO ATTORNEY—ERRONEOUS CONCLUSION OF ATTORNEY AS TO DEFENSE—INSUFFICIENT LEGAL JUSTIFICA-**

**TION FOR VACATING DEFAULT.**—In an action brought against an administrator to quiet title to property of his intestate, the order vacating the default judgment entered therein against such administrator, on the ground of his mistake and excusable neglect, is without legal justification, where the copy of the complaint and summons served upon defendant was not read by him, but placed in the hands of the attorney for the estate, and without any explanation of the defense, and the attorney concluded that no valid defense existed.

**ID.—MISTAKEN JUDGMENT OF ATTORNEY—USELESSNESS TO DEFEND ACTION—INSUFFICIENT GROUND FOR RELIEF.**—Mistake on the part of an attorney in concluding that it was useless to make a defense to the action is not the kind of a mistake for which a judgment may be set aside, although it might be the basis for an independent action for damages against the attorney.

**APPEAL** from an order of the Superior Court of Placer County vacating a judgment. J. E. Prewett, Judge.

The facts are stated in the opinion of the court.

Ben P. Tabor, for Appellant.

Tuttle & Tuttle, for Respondent.

**BURNETT, J.**—The appeal is from an order vacating a judgment quieting plaintiff's title to certain real estate. The order was made upon the ground of "the mistake and excusable neglect" of the defendant. Appellate courts are strongly inclined to uphold such an order if there be found in the record any legal justification for the action of the lower court. It is desirable, of course, to have causes tried and determined upon their merits, and, no doubt, this consideration was the determining factor with the lower trial judge herein. However, when the orderly processes of law have been followed and a judgment regularly obtained, there must be some substantial evidence received to excuse in a legal sense the inaction of the defendant before the court will be justified in setting at naught its prior determination, especially in a case where, as here, an innocent purchaser relying upon the validity of said judgment has acquired the property for a valuable consideration.

We may say that the first application was denied, but respondent was allowed to renew it. The latter application was based largely upon the same evidence as the first. The two affidavits of respondent herein, however, differ somewhat.

As the only evidence tending to show mistake or excusable neglect is found in said affidavits, we herewith set them out.

The first is: "I am and was at all times mentioned the duly appointed, qualified and acting administrator of the estate of M. Mukai, deceased; that on or about the 2nd. day of December, 1915, I was served with a paper by the sheriff of Sacramento County; that I was in the courthouse in Sacramento at the time and very busy; that I glanced at said paper saw it was pertaining to the estate of M. Mukai, deceased, and took it to the attorney for said estate, Lee Gebhart, and as he was very busy at the time, left it on his desk; that I did not open said paper or look at its contents and did not know that it was a complaint to quiet title to the property of the estate of M. Mukai, deceased; that I never knew such an action was pending until Nakamoto, of Penryn, rang me up after the judgment was made and informed me of the fact; that I would have defended said action if I had known that it was pending."

Then follows the statement that he has a good defense to the action.

It is quite apparent that the foregoing affords no legal justification for setting aside the default. Nothing in the nature of mistake or excusable neglect is disclosed. If either existed it must have been on the part of the defendant or of his attorney. As to the former, the only semblance of mistake relates to his ignorance of the nature of the document placed in his hands and of the fact that a judgment was entered against him. But there is no contention that he did not understand English, and if he failed to read the summons, he cannot urge that as an excuse for his failure to defend the action. That circumstance would constitute negligence rather than mistake, and, assuming it to be negligence, it would be inexcusable, and no attempt was made to excuse it. In fact, however, he did what might be expected under the circumstances; he placed the papers in the hands of his attorney. This was, no doubt, because he had faith in his attorney, and that fact does not afford any evidence of mistake or negligence.

Was there any mistake or negligence—excusable or otherwise—on the part of the attorney? There is no showing to that effect. To the contrary, the presumptions are all that the attorney was capable and honest; that he gave his atten-

tion to the business in hand; that after consultation with his client he was convinced that there was no valid defense to the action and that no additional expense should be incurred. If there had been any showing that the client was deceived or defrauded by his attorney or that the latter did not act in good faith, it might be that a court in a proceeding like this could nullify his action, but the case thus far is one entirely devoid of any element of fraud, mistake, negligence, or surprise in the legal sense, and we see no reason for the application of section 473 of the Code of Civil Procedure.

Is the situation changed by virtue of the second affidavit of the respondent? The only additional averment contained therein bearing upon the question before us is:

"That at all times since my appointment to said office Lee Gebhart has been my attorney and handled the legal matters pertaining to said estate; That I had the utmost confidence in said Lee Gebhart and not being versed in legal procedure in this country intrusted all matters to him to handle as he deemed best; that I never did talk over the above case with Lee Gebhart as he deposes, and never consented to the entry of the default in said case and as soon as I heard that a default had been entered in said case I procured other counsel to move to have the default set aside."

In this there is no additional fact tending to show any mistake on the part of respondent or any negligence except, possibly, in one respect to be hereafter noticed. Neither is there anything to disclose a mistake on the part of the attorney or any negligence that can be corrected in a proceeding like this.

In fact, he exculpates himself on the ground that he intrusted the entire matter to his attorney. That circumstance, of course, does not evidence negligence or mistake on his part. It was, indeed, justified by his confidence in his attorney. And as far as the latter is concerned, there is nothing to indicate that he was unworthy of that confidence, unless it be implied in the statement in reference to the conversation with said attorney and as to the consent to have a default entered.

As to the conversation, Mr. Gebhart deposes:

"On or about the 2nd. day of December, 1915, and while acting as attorney for said Akahori in the matter of the estate of Mukai, said Akahori brought to my office a copy of the

complaint and summons in the above entitled action which he said had been served upon him. I read the complaint and summons, talked with Akahori about the matter, and advised him, after learning the facts of the case that in my opinion it was inadvisable to defend the action. Subsequently and before default was entered in the case, Mr. Tabor, the attorney for plaintiff in said action, called at my office and I informed him that no defense would be made to the action."

It is to be observed that respondent's denial of this is somewhat equivocal. He does not specifically aver that he had no conversation whatever about the case with his attorney but that he did not have the conversation as Mr. Gebhart deposes. This denial would be consistent with the position that the conversation occurred *substantially* as stated by Mr. Gebhart.

However, conceding full effect to the denial and ignoring the improbability that a client, under such circumstances, would have no conversation with his attorney about the case, it must follow that the failure of respondent to state the facts was inexcusable negligence on his part in the absence of any satisfactory explanation of his conduct.

The averment that "he never consented to the entry of a default" is of no avail in view of the fact that he admits that he intrusted the entire matter to his attorney, involving as it would the question of discretion as to whether any defense should be made.

We repeat, if there was any mistake or negligence in the case, it was that of the attorney and not of the client, except as to the single fact of the failure to explain the defense, and this has not been excused.

But there is nothing to show that the attorney did not have full information from other sources as to the alleged defense of respondent, or that he did not act with the utmost good faith for the advantage of his client. In fact, there is no averment from which the inference can be drawn that the attorney's conduct in the premises was the result of "mistake, inadvertence, surprise, or excusable neglect," as contemplated by said section 473 of the Code of Civil Procedure. At most, it may be implied that he was mistaken in his judgment that it was useless to make a defense to the action. This, however, is not the kind of a mistake for which a judgment can be set aside, although it might be the basis for an

independent action for damages against the attorney. (*Lally v. Kuster*, 177 Cal. 783, [171 Pac. 961].)

To recapitulate, the whole showing made by respondent amounts to this: An action was brought against him to quiet title. He placed the matter in the hands of his attorney. There is nothing to impeach the character or ability of said attorney. There is no evidence that either he or his attorney was deceived or misled. The only circumstance of which complaint could be made by respondent is that his attorney's judgment was at fault in concluding that he had no valid defense.

But this, manifestly, is not sufficient ground for setting aside the judgment. Otherwise, every suit that is lost through the error or mistake of an attorney would be subject to the operation of said section 473.

For further elucidation of the legal principles involved, we may refer to *Porter v. Anderson*, 14 Cal. App. 716, [113 Pac. 345]; *Redding etc. Min. Co. v. National Surety Co.*, 18 Cal. App. 488, [123 Pac. 544]; *Shearman v. Jorgensen*, 106 Cal. 483, [39 Pac. 863]; *Alferitz v. Cahen*, 145 Cal. 397, [79 Pac. 878].

If we look into the showing made by appellant we find additional reasons for upholding the judgment. Not only is the theory of the application of said section of the code strongly combated, but it is shown, as before indicated, that the rights of an innocent purchaser, who relied upon the integrity of said judgment, would be jeopardized if the order is allowed to stand.

Respondent may have a remedy if he has been wronged, but it does not appear that he is entitled to the one which he has invoked.

The order is reversed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 2378. First Appellate District.—April 20, 1918.]

**NETTE SEXTON DOW (a Widow), et al., Appellants, v.  
GEORGE E. DOW ESTATE COMPANY (a Corpora-  
tion), et al., Respondents.**

**ACTION TO SET ASIDE TRANSFER OF INTEREST IN ESTATE—MENTAL IN CAPACITY AND UNDUE INFLUENCE—JUDGMENT SUPPORTED BY EVIDENCE.**—In this action by the widow and minor child of a deceased person against the mother, brothers and sister of deceased, and certain corporation defendants to set aside, upon the ground of decedent's mental incapacity and the undue influence of his relatives, a certain transaction whereby deceased transferred his one-eighth interest in his father's estate to the defendant corporation, and took one-eighth of the stock in return therefor, it is held that the evidence is sufficient to support the judgment for defendants.

**1D.—CONSIDERATION OF TESTIMONY—DISCRETION NOT ABUSED.**—In such an action, it is not an abuse of discretion to accept the testimony of defendant's witnesses, although they only saw the deceased occasionally, in preference to that of plaintiff's witnesses, who saw him every day during his last illness, which began some time prior to the transfer.

**1D.—INTIMATE ACQUAINTANCES—INFREQUENT VISITS—INSUFFICIENT GROUND FOR DISQUALIFICATION.**—In such an action, the mother, brothers, and sister of deceased are not disqualified to testify as intimate acquaintances because their visits to the deceased during the last few years of his life were rather infrequent.

**APPEAL** from a judgment and order of the Superior Court of the City and County of San Francisco. **Thomas F. Graham, Judge.**

The facts are stated in the opinion of the court.

**Mastick & Partridge, and H. F. Chadbourne, for Appel-  
lants.**

**Coogan & O'Connor, and Julius Kahn, for Respondents.**

**ZOOK, J., pro tem.**—This is an action by the widow and minor child of Edwin Tyson Dow, deceased, against the mother, brothers, and sister of said decedent and certain corporation defendants to set aside, upon the ground of decedent's mental incapacity and the undue influence of his rela-

tives, a certain transaction whereby Edwin Tyson Dow transferred his one-eighth interest in his father's estate to the defendant George E. Dow Estate Company, a corporation, and took one-eighth of the stock of the corporation in return therefor. Defendants had judgment, and as the questions raised on this appeal may be briefly disposed of, it will be unnecessary to set forth the facts of the case herein.

Appellants' main contention is that the evidence was insufficient to support the judgment, and their brief is devoted mainly to a discussion of the evidence. They claim that because their witnesses, the wife, nurses, and the intimates of Dow, saw him every day during his last illness, which began some time prior to the transfer, their testimony should, as a matter of law, have been accepted in preference to that of defendants' witnesses, who saw Dow only occasionally, and that the failure of the trial judge so to hold was an abuse of discretion, requiring a reversal of the judgment. In support of this rather unusual contention, a more startling claim is made, namely, that the mother, brothers, and sister of decedent were not qualified as intimate acquaintances because their visits to him during the last few years of his life were rather infrequent. Both points are equally devoid of merit. We have carefully examined the whole record, and find ample evidence to support the court's finding in support of the validity of the transfer. Indeed, it would require a considerable preponderance of evidence to upset the transfer under any circumstance, for it is apparent that, in making the transfer, the decedent in effect changed the form only of his interest in his father's estate, without altering the extent thereof in the slightest degree.

The only other question raised is as to the correctness of the court's finding that the action was barred by laches. As there was a complete hearing of the case on its merits and a finding adverse to appellant thereon, the question whether or not the cause of action was barred becomes wholly immaterial.

The judgment is affirmed.

Kerrigan, J., and Beasley, J., *pro tem.*, concurred.



[Civ. No. 1564. Third Appellate District.—April 22, 1918.]

**JAMES EDSON et al., etc., a Copartnership, Appellants, v.  
M. A. MANCEBO, Respondent.**

**SALE—BREACH OF WARRANTY—PROCREATIVE POWERS OF STALLION—RECOVERY OF PRICE—BURDEN OF PROOF.**—In an action to recover upon promissory notes given for the payment of a stallion, which was sold under a written guaranty that he was a sixty per cent foal-getter, and that if not, the sellers would furnish another stallion upon his redelivery, it was incumbent upon the defendant, in order to defeat the action upon the theory that the guaranty contained the real agreement of the parties, to show that the horse failed to meet the procreative requirement, that he was properly cared for, and that the defendant delivered or was legally excused from delivering him to the sellers in as good condition as when sold.

**ID.—RETURN OF STALLION—OFFER OF BUYER—SUFFICIENCY OF.**—Under such a warranty, where the buyer, upon discovery of the lack of potency of the stallion, offered to return the animal, but the sellers refused to furnish him with another horse, such refusal relieved the buyer of an obligation to do more than to offer to make the return.

**ID.—TIMELY OFFER TO RETURN.**—Where such warranty was not limited to one season and the buyer, upon discovery of the lack of potency of the horse, did not make offer to return him until the early part of the next season, the offer was timely, it not being unreasonable to try him another season.

**APPEAL** from a judgment of the Superior Court of Merced County. E. N. Rector, Judge.

The facts are stated in the opinion of the court.

William V. Cowan, for Appellants.

F. W. Henderson, for Respondent.

**BURNETT, J.**—The suit was brought to recover upon three promissory notes executed by respondent on March 5, 1913. The validity of the notes was not disputed nor was it denied that the amount claimed was unpaid. The defense was that they were given for the payment of a certain stallion purchased by respondent from appellants upon a certain guaranty that failed and thereby avoided the contract. It is not disputed that there was a written guaranty, as follows:

"If the above-named stallion should not get 60 per cent of the producing mares that are properly bred and returned for second trial at the end of the third week in foal, during the breeding season commencing April 1st, and ending August 1st, with proper care and management, we agree to find another stallion of the same size, breed, and quality upon delivery of the above-named stallion in as good condition as at present to our barn at Sacramento, California."

Another defense was that the respondent was illiterate, that he could not and did not read the contract, that appellants, through their agent, deceived respondent as to the terms of the guaranty, by reading it to him so he thought it provided that said stallion was potent to the extent of getting at least sixty per cent of the mares bred to him in foal, and, that in the event of his failing so to do, said stallion might be returned, and the notes hereinbefore mentioned canceled and returned to defendant. Respondent, therefore, asked to have the contract reformed in that respect and enforced as thus reformed. There is no dispute as to the sufficiency of the pleadings, and, therefore, the demurrer need not be considered.

A jury found a general verdict for the defendant and the court reformed the guaranty, as prayed for, and gave judgment to the defendant for his costs.

We may consider the case first upon the theory that the written guaranty contained the real agreement of the parties. In that respect, to defeat the action, it was incumbent upon the defendant to show that the horse failed to meet the procreative requirement, that he was properly cared for, and that respondent delivered or was legally excused from delivering said stallion to appellants, in as good condition as when said stallion was sold, at their barn in Sacramento. In other words, there must have been a violation of the warranty on the part of appellants and no default on the part of respondent. This, of course, the law required and the jury was so instructed.

Considering, then, the terms of the warranty, we may say that the evidence was ample to show that the horse was woefully lacking in potency. It would probably not be inappropriate to call him a "slacker." It would do no good to repeat the evidence, but it has been read with some care. Nor can it be doubted that the horse received proper care and

management, and that during all the time in controversy he remained in as good condition as when he was sold. The only remaining element relates to the duty of the defendant to redeliver the horse to the plaintiffs at Sacramento.

He did not so deliver him, but there is substantial evidence from which the reasonable inference follows that he was not in default for his omission thus to return the horse. After ascertaining that the stallion was deficient, he had a conversation with one Biggerstoff, as follows:

"I told him that horse is no good, to take that horse away and give me my notes back; take that horse; if you don't give me another horse like that, I want to make money for to pay for it. . . . I say, 'The horse is no good, Mr. Biggerstoff, you better do that.' He said, 'I am going to sell it.' . . . He said he would not give me the horse that would weigh the same as that. He would not get it; he said this is a big Belgian I got and he said, 'I cannot get another horse just like that, that weigh the same.' "

As to this, it might be stated that Biggerstoff represented appellants throughout the transaction. There is no doubt of the sufficiency of the evidence not only to show ostensible but real agency on his part. Said conversation may, therefore, be regarded as if it had taken place with the appellants themselves. The result is that upon the offer of respondent to return the horse as he had agreed, appellants declined and refused to furnish him with another horse as they had promised. The conditions being mutual and concurrent, the refusal of appellants to comply with their covenant, of course, relieved respondent of an obligation to do more than to make the offer.

Under such circumstances, offer to perform is equivalent to performance. No citation of authority is required for the support of such proposition. We may say, though, that the principle is recognized in section 1511 of the Civil Code. As to the good faith of respondent, we may add, that he attempted to sell the horse, in fact, delivering him to said Biggerstoff for that purpose upon the latter's solicitation, but the effort failed of any results, and there is evidence in the record that the horse was and is without any appreciable value.

From the showing made by respondent, we may, therefore, conclude that the consideration for the notes was lost through

the failure of the warranty without any default on the part of the respondent.

The evidence being sufficient to support the first defense of respondent, it is unnecessary to consider the second. In fact, support for the first would necessarily cover the second.

Appellants seem to think that the conclusion reached is opposed to the doctrine of the case of *Union Investment Co. v. F. M. Landon Co.*, 32 Cal. App. 305, [162 Pac. 903], decided by this court. Therein, it is true, that in a similar action upon a similar contract, it was held that a mere offer to return was not sufficient to entitle the vendees in an action brought against them to recover the balance of the purchase price to successfully urge the breach of the warranty as to the breeding qualities of the horse as a defense to the action. But, in that case, there was no waiver of the performance on the part of the vendees and it was very justly said: "And there could be a failure of consideration only in case the stallion failed to come up to the percentage for foal-getting provided by the warranty and the refusal or failure of the vendees to replace the stallion with another of the same breed and value."

Herein, we are justified in holding that the horse fell short of the warranty, that there was a refusal of the vendors to supply another animal as agreed, and that they waived the performance by respondent of his agreement to deliver the horse at Sacramento.

Another point made by appellants is "that the failure of the defendant to offer to return the horse within a reasonable time after August, 1913, precluded him from setting up a lack of consideration." There is evidence, however, that this offer was made in the latter part of the year 1913, or in the early part of the spring of 1914. It was timely, for two reasons: First, because it was as soon as practicable after the ascertainment of the fact as to the horse's incapacity, and, second, because the warranty was not limited to the season of 1913. Manifestly, the vendee would not be permitted to retain the horse indefinitely without offer to return him, but it would not be unreasonable to hold that he might elect to try him for another season to determine beyond question the ability of the horse to meet the situation.

Moreover, it appears from the testimony of appellants that if the offer had been made immediately after August 1, 1913,

it would have been of no avail, since it would not have been accepted and no exchange would have been made. Therefore, any delay was without prejudice to appellants.

The only other point made is that the court erred in refusing to give the following instruction: "I instruct you that the contract between the plaintiff and defendant required defendant within a reasonable time after the breeding season of 1913 to demand that plaintiff replace the stallion Socrates with another stallion. If you find from the evidence that the defendant did not within such time demand that said stallion be replaced and if you further find that said notes were not induced by fraud or misrepresentation, it is your duty to bring in a verdict in favor of the plaintiff."

But it is sufficient to say that if there was an offer, it was made within a reasonable time. In other words, there is no evidence that it was not seasonably made. Hence, the theory of the instruction in that respect was not supported by any evidence. Besides, appellants admit that they would have refused any offer made after August 1, 1913. In view of that admission, they could not claim that an offer should have been made immediately thereafter. It would have been an idle act, and, therefore, not required.

Moreover, the instruction would have submitted to the jury the issue of fraud, whereas it was reserved and determined by the court itself in accordance with the averments of the answer. It was the province of the court and not of the jury to determine that issue.

Respondent claims that the record shows that the judgment has been satisfied, and, therefore, no appeal lies. We find no such evidence in the transcript, but for the reasons stated we think the judgment should be affirmed, and it is so ordered.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 1844. Third Appellate District.—April 22, 1918.]

**KELSEY COMPANY** (a Corporation), Appellant, v. **MRS. MIRIAM SPEARS et al.**, Respondents.

**JUDGMENT—MOTION TO VACATE—TIME.**—Where the defendants appeared in court and formally made their motion to set aside the judgment within six months after its rendition, as required by section 473 of the Code of Civil Procedure, the fact that after reading the motion the further consideration thereof was postponed until after the expiration of such statutory period did not divest the court of jurisdiction to grant relief.

**ID.—ORDER TO SHOW CAUSE—WHEN IMMATERIAL.**—Where the adverse party made his appearance in court at the time fixed for hearing the motion to set aside the judgment and had an opportunity to do all that he could do under any circumstances, the fact that a formal order to show cause was not made was immaterial.

**ID.—COMPROMISE JUDGMENT — ORDER SETTING ASIDE — DISCRETION NOT ABUSED.**—Where the defendants in an action concerning water rights agreed to a compromise judgment and authorized their attorney to prepare a judgment according to the terms and conditions of the compromise, but upon the understanding that the judgment was to be submitted to them for their approval before it should be entered, and the judgment was entered without such submission, and they did not understand or appreciate the effect or significance of such judgment as explained to them by their attorney, it was not an abuse of discretion to set the judgment aside.

**APPEAL** from an order of the Superior Court of Merced County granting a motion to set aside a judgment. **E. N. Rector**, Judge.

The facts are stated in the opinion of the court.

**F. W. Henderson**, and **H. K. Landram**, for Appellant.

**F. W. Reeder**, for Respondents.

**HART, J.**—The appeal is by the plaintiff from an order of the superior court of Merced County entered on the seventeenth day of March, 1916, granting defendants' motion to set aside a judgment and decree entered on the tenth day of May, 1915. The proceeding is founded on section 473 of the Code of Civil Procedure.

The controversy arose over rights of the respective parties to the use of water for domestic and irrigation purposes. It appears from an affidavit of defendant, Mrs. Spears, sworn to on November 3, 1915, that the complaint in the action was filed on September 4, 1912; that she employed F. G. Ostrander as her attorney and an answer to the complaint was filed; that, on May 10, 1915, a decree and judgment was filed in said action wherein it was set forth that "the parties to the foregoing action have in open court stipulated that findings of fact be waived in the foregoing action and that judgment in said action be made and entered as herein provided"; that said defendant never at any time or place gave to said Ostrander or any other person authority to waive findings or stipulate to have judgment entered; that said Ostrander exceeded his authority and acted without deponent's consent in so stipulating; "that deponent did agree with F. G. Ostrander that judgment might be entered on certain conditions, that is to say, before judgment was entered a copy of said judgment was to be submitted to defendant for her approval and if not satisfactory to her the judgment was not to be filed but the trial of the case was to proceed under the pleadings; that defendant instructed F. G. Ostrander that the judgment must provide for water for domestic use at all times, also that deponent was to have all necessary water for the irrigation of all vegetables or small fruits that might be raised on deponent's said land whenever she wished to use same, also that the water flowing in the irrigation ditches of plaintiff's lands was to be allowed to flow to defendant's land when the same was not being used by plaintiff; that said decree does not provide for either or any of the above stipulations and conditions; that deponent is taken by surprise and a great wrong and irreparable injury will result to deponent if said decree is permitted to stand; that no copy of said decree was ever submitted to deponent by her attorney or any other person until after said decree had been filed; that deponent has made repeated efforts to have her attorney, F. G. Ostrander, amend said decree to conform to deponent's stipulations and conditions," but that said Ostrander has failed and refused so to amend said decree.

On the 4th of November, 1915, the present attorney for defendants served and filed a notice of motion to set aside said judgment and decree, said notice specifying the fifteenth day

of November, 1915, as the date upon which said motion would be made. The motion was duly made on the ground that F. G. Ostrander "exceeded his authority in having said decree entered and that defendants are taken by surprise."

At the hearing of the motion the foregoing affidavit of Mrs. Spears and also an affidavit of defendant, Leonard Spears, containing substantially the same matters, were presented. Counter-affidavits were filed and also oral testimony presented in opposition to the motion. Among the facts brought out by the plaintiff was that, after Mrs. Spears registered her objection to the decree with her attorney, Judge Ostrander, the latter and the attorney for the plaintiff entered into a stipulation agreeing to an amendment of the decree in such manner and to such extent as that Mrs. Spears would be entitled to the use of a certain specifically named number of inches of water during the time that the decree awarded to the plaintiff the "exclusive use of the said water in said north or main ditch."

Appellant first insists that the court was without jurisdiction to set aside the decree for the reason that the application was not made within six months after the rendition of the decree, as required by section 473 of the Code of Civil Procedure.

The record discloses that the decree was entered on the tenth day of May, 1915, and, on November 4, 1915, defendants filed and served their notice of motion. Thus it will be noted that the notice was filed and served six days before the expiration of the six months' period within which, under the statute, such a motion must be made. It is the contention, however, that the notice stated that the motion itself would be made on November 15, 1915, five days after the six months' period elapsed, and it further appears that the motion was not in fact made or brought up for consideration by the court until said fifteenth day of November, 1915.

Counsel for the appellant contend: 1. That section 473 of the Code of Civil Procedure contemplates that a motion to set aside a judgment for any of the reasons set forth in said section must not only be filed and served within the period of six months after the rendition of such judgment, but that it must also be pressed to a hearing or made to the court within that period of time; 2. That the court must make an order on the adverse party to show cause on a day fixed why



the motion should not be granted; 3. That the opposing party must be duly notified of such order. As to the merits of the controversy, it is contended that, under the general authority of an attorney, the attorney for the defendants was authorized to stipulate that judgment might be entered against his clients and to waive findings of fact; that an attorney is not precluded from consenting to the entry of a judgment against his client except in those cases where his authority is expressly limited by the client to do certain specific acts in the litigation; that there is no showing here that the attorney for the defendants was restricted by the latter to the performance of certain acts or was without the general authority of an attorney in this action.

1. It is conceded by counsel for the appellant that the defendants appeared in court and formally made their motion within the statutory time, but it appears that, after reading the motion, counsel asked that the further consideration thereof be postponed to a later date, to wit, the fifteenth day of November, 1915, which was after the expiration of the six months' period within which the defendants were authorized to make their application to be relieved from the consequences of the decree. The date for the hearing of the motion having accordingly been fixed for a date beyond the statutory period within which the relief sought might be asked for and granted, the result followed, so counsel for the appellant contends, that the court was divested of jurisdiction, and thus the defendants lost any right they otherwise might have had to be relieved. A sufficient and, indeed, a complete answer to this proposition may be found in the comparatively recent case of *Brownell v. Superior Court*, 157 Cal. 703, 709, [109 Pac. 91, 94]. In that case, the motion was filed and served a few days prior to the expiration of the six months' limitation, and the court made an order that the motion be heard on October 4, 1909, which was some twelve or thirteen days subsequent to the date of the expiration of the period of limitation. There, as here, it was contended that the court lost jurisdiction of the motion because it was not pressed to a hearing within the statutory period of six months after the entry of the order from the effect of which relief was therein sought. Through Mr. Justice Shaw, the court held that "it is the *application* which is to be made within the six months. A motion is an application for an order. The letter as

well as the spirit of the law is fulfilled where the party appears and moves the court for the relief within that period, and thereupon the court makes an order on the adverse parties to show cause on a day fixed why the motion should not be granted, and they are duly notified thereof."

2. Thus we are brought to the consideration of the second and third propositions, as above stated, and which also involve the challenging of the authority of the court to make the order appealed from. There is, it is true, no showing in the record that the court, upon the presentation of the motion, made an order requiring the appellant to show cause, on the fifteenth day of November, 1913, which was the date fixed for the hearing of the motion, why said motion should not be granted, nor does the record show that a notice of any such order was served on the appellant. But, it seems to us that a sufficient reply to the point thus sought to be made lies in the fact that, on the fifteenth day of November, 1915, the date fixed by the court for the hearing of the motion, appellant and its counsel were in court and took part in the proceedings upon the motion and resisted the allowance of the application by filing counter-affidavits and introducing oral testimony tending to impeach the showing made by the defendants in support of the application. Obviously, the sole purpose of an order to show cause and notice thereof to the party adversely affected by the motion as to which such order is made is to inform such "adverse party" of the time and place of the hearing of the motion, and where, as here, the "adverse party" has made his appearance in court at the time fixed for hearing the motion and has had an opportunity to do all that he could under any circumstances do to overcome the effect of the showing made in support of the motion, it would seem that whether the court did or did not make a formal order to show cause or whether the adverse party was or was not formally notified of the order, becomes a matter of no material importance. While we do not hold that a formal order to show cause should not in such a case be made, yet it is in point of fact true in effect that the order fixing a date for the hearing of the motion is an order to the other party to show cause. Of course, it will not be contended that the failure formally to notify the appellant of the order to show cause, if any was formally made, is of any material importance, since it is true that it

had ample opportunity to defend against the allowance of the motion, it having evidently before the date fixed for the hearing procured and prepared counter-affidavits and subsequently filed the same, and it having been represented by counsel in court at the time of the hearing and introduced oral proof in opposition to the allowance of the motion.

3. As to the merits of the motion, we remark: That, while the proofs seem to indicate that the attorney for the defendants was vested with general authority as such in the action out of which the present controversy arises, and probably, therefore, had the authority to consent to a judgment in said action, and while, furthermore, it appears that the defendants agreed to a compromise judgment and authorized their attorney, Judge Ostrander, to prepare a judgment according to the terms and conditions of the compromise, yet there are other considerations presented by the record upon which the court could justly have concluded that the interest of justice justified the order setting aside the decree.

It is clear that the court, if it believed the testimony presented by the defendants in support of the motion, as evidently it did, was justified in finding that the defendants did not understand or appreciate the scope and effect or significance, in its practical operation, of the compromise judgment as it was explained to them by their attorney. The latter undoubtedly acted in good faith with the defendants and honestly advised them as to the extent to which they were, under the facts as he had learned them, entitled to the use of the water flowing in the main ditch; but the defendants, as the proofs clearly enough show, in good faith supposed or believed, from the explanation made to them by the lawyer, that they were, under the compromise, to be awarded a greater quantity of water or a greater use thereof than the decree as entered allowed them. It also appears that it was understood between the defendants and their attorney that the former should be shown the decree and permitted to examine it before it should be entered and that this was not done. Under all these circumstances, we cannot say that the trial court abused its discretion in allowing the motion. We do not believe that a litigant should be bound by a compromise made by his attorney where, as here, the facts upon which the compromise was effected were not understood by the litigant or where the latter obtained a misapprehension or

an erroneous impression of the effect and scope of the compromise as the same was explained to him by his attorney. The court in this case, having examined and fully considered the testimony presented both for and against the motion, obviously reached the conclusion that the defendants did not in point of fact consent to the compromise of which the decree as entered stood as evidence; that the defendants were not given but should have been given an opportunity to examine the decree before it was entered, and so allowed an opportunity to determine for themselves whether the decree corresponded with the terms of the compromise as they understood and intended them; and that, therefore, in the interest of justice, the decree should be set aside and the defendants given an opportunity to have the respective rights of themselves and the plaintiff tried and adjudicated. We repeat that we can see no abuse of discretion in the action of the court in granting the motion.

It is true that the proofs show without conflict that, upon objection being made by the defendants to the decree as filed, respective counsel for the plaintiff and the defendants agreed to an amendment to the decree which it appears would make more specific and award to the defendants greater rights in the water involved in the controversy than did the original decree. But the defendants deny that they consented to the amendment and declare that they do not now agree to it. It may be observed that the fact of the agreement to the amendment by the appellant is evidence of the fact that it conceded that the original decree failed to give the defendants their full rights in the use of the water, and in a measure supports the conclusion that the court below did not abuse its discretion in making the order appealed from.

The order is affirmed.

Chipman, P. J., and Burnett, J., concurred.

87 Cal. App.—3

[Civ. No. 1846. Third Appellate District.—April 22, 1918.]

FRED WENTLAND et al., Appellants, v. CLARK & HENERY CONSTRUCTION COMPANY (a Corporation), Respondent.

**STREET LAW—PROCEEDINGS UNDER IMPROVEMENT ACT OF 1911—DOING OF WORK BY PROPERTY OWNERS—DUTY AS TO AWARDED OF CONTRACT.**—Under the part of section 12 of the Street Improvement Act of 1911 (Stats. 1911, p. 730), providing that the owners of three-fourths of the lots liable to be assessed may within ten days after the first publication of the notice of award of contract elect to take said work and enter into a contract for the doing of the same, and that if they fail to so elect the superintendent of streets shall enter into a contract with the person to whom the contract was awarded, when the board of trustees makes its award, its powers and duties in respect to the letting of the contract cease, and it then becomes the duty of the superintendent of streets to enter into the contract, and a notice given by the property owners to the trustees within the ten days confers no rights upon the property owners nor imposes any duty upon the trustees.

**10.—TIME OF COMPLETION OF CONTRACT—MISTAKE IN RECORDING CONTRACT—VALIDITY OF LIEN UNAFFECTED.**—A lien for street work done under the Improvement Act of 1911 is not invalid because of an error in copying into the record kept by the superintendent of streets that the contract was to be completed within 80 days, the original contract on file calling for 180 days, since the lien existed before the making of the record.

**11.—PLANS FOR WORK—ERRONEOUS STATEMENT OF FRONTAGE—VALIDITY OF ASSESSMENT UNAFFECTED—REQUIREMENTS OF SPECIFICATIONS.**—An assessment for work done under the Improvement Act of 1911 is not invalid for the reason that the plans which accompanied the specifications indicated an erroneous frontage as to some of the property owners, where the specifications and resolution of intention did not call for the improvement of a certain number of feet in front of each lot, but for the improvement of the street between certain stated points.

**APPEAL** from a judgment of the Superior Court of San Joaquin County. J. A. Plummer, Judge.

The facts are stated in the opinion of the court.

Walter R. Dunn, for Appellants.

White, Miller, Needham & Harber, for Respondent.

CHIPMAN, P. J.—This is an action to quiet title from a street assessment with a cross-complaint by defendant for moneys claimed to be due under the assessment.

There were three cases set down in the trial court at the same time for trial—the present case, No. 1846, and the case of *Lillie v. Clark & Henery Construction Co.*, *post*, p. 815, [173 Pac. 483]. In the third case Ann M. Phillips is plaintiff and is here on appeal in No. 1846. The trial court directed “that the evidence introduced, so far as the same is applicable, shall be considered as directed to the case to which the testimony may be pertinent as it may be introduced.” At the hearing here, counsel addressed themselves to *Wentland et al. v. Clark & Henery Construction Co.*, [173 Pac. 480], with the understanding that the points involved were the same as in No. 1845, and should embrace the case in which said Phillips is plaintiff. Judgment went for defendant and cross-complainant.

The appeal is from the judgment and is by plaintiffs Fred Wentland and Ann M. Phillips.

The city of Lodi, a city of the sixth class, by its city council, on October 9, 1914, adopted plans and specifications and passed a resolution of intention to grade, pave, and gutter three blocks of Pine Street in said city “from the center line of Garfield Street to the easterly city limits.” The contract for the work was duly awarded to defendant on November 18, 1914, and publication of notice thereof duly given and made on November 20, 1914. Certain of the owners of lots fronting on that part of Pine Street to be improved, among the number appellants Wentland and Phillips, decided to take over the proposed work themselves. A daughter of one of the interested parties telephoned on their behalf to the superintendent of streets, Coleman, within ten days after the contract was awarded to respondent, informing him of their intention and requesting information as to the necessary procedure. He answered that he could do nothing for them.

Witness Fleming, one of the property owners, testified that he had a conversation with Mr. Coleman, street superintendent, two or three days prior to November 30, 1913, and was asked what the conversation was: “I asked him for plans and specifications for to figure on, told him we were to take over the paving and do it ourselves; and he said he didn’t have any, couldn’t furnish me any. He says, ‘By the way, I

have some specifications for curbing that I made myself. I can furnish them to you,' and he also gave them to me; and that was practically all there was said. Q. Did you or did you not at that time tell him whether or not you wanted to take over the contract? A. I told him we were figuring on it, to take it over, and we wanted those plans and specifications to figure on, to know what we were to do. Q. Did you afterward have any conversation with him after that, in regard to it? A. I did not. Q. Ever go to see him? A. I don't think I did." No further notices were given to the superintendent of streets and no other requests were made to him. Counsel for plaintiff offered to prove by this witness that on November 30, 1914, the property holders went before the board of trustees "and then and there told the board of trustees they were there for the purpose of taking over the contract for the performance of this work, and that the board of trustees told them they were too late, and refused to let them have the contract." The offer was objected to as immaterial, irrelevant, and incompetent and the objection was sustained. Counsel for defendant moved "to strike out the testimony of the witness concerning the conversation between him and the superintendent of streets. Coleman, as being irrelevant and immaterial." The Court: "I can state right from the bench with regard to testimony of that kind, it is not sufficient in legal effect to justify the court in taking any action on it. Now, whether any testimony will be introduced upon which the court could take action, I cannot say until I have heard all the testimony." No further testimony was offered by plaintiffs. The remaining evidence consisted of copies of certain of the proceedings in the matter of letting the contract, namely: The contract and the contractor's bond; certificate of the engineer; assessment; contractor's return; diagram; warrant; street superintendent's certificate; plans and resolution of intention.

It should be noted that plaintiffs made the following offer: "Mr. Dunn (plaintiff's attorney): We want to prove by this witness (Mr. Coleman), the superintendent of streets, after the recording of this assessment, did not keep his office open during business hours, between the fourteenth day of—after recording the instrument—until the expiration of the thirty

days within which the property holders were required to appeal to the board of trustees. Mr. White: To which offer I object as incompetent, irrelevant, and immaterial, on the ground that the property owner, or any citizen has, or any party interested, has an entirely different mode of relief if a public officer don't keep his office open. The Court: The objection is sustained. We are not trying Mr. Coleman as to whether he has innocently rendered himself liable for damages by failure to keep his office open during business hours. Mr. Dunn: That is all."

1. The point principally urged by appellants is, that it was the duty of the board of trustees, in response to the notice given them by the property owners, to direct the street superintendent to let the contract to them. The work in question was being done under the Improvement Act of April 7, 1911 (Stats. 1911, p. 730). Section 12 of the act reads, in part, as follows: "The owners of three-fourths of the frontage of lots and lands liable to be assessed, or their agents, and who shall make oath that they are such owners or agents, shall not be required to present sealed proposals or bids, but may, within ten days after the first publication of said notice of said award, elect to take said work and enter into a written contract to do the whole work at the price at which the same has been awarded. . . ."

The section provides that "should the said owners fail to elect to take said work, and to enter into a written contract therefor within ten days . . . it shall be the duty of the superintendent of streets to enter into a contract with the original bidder to whom the contract was awarded, and at the prices specified in his bid." The section does not specifically indicate to what officer or body the application of the owners must be made. Appellants claim, however, that "it may easily be drawn from section 13 that in letting a new contract, the city council must disregard further election of the owners. In the absence of statutory direction to the contrary, the owners should have the right to make their election before either the city council or the superintendent of streets." Section 13 throws no light upon the question. It simply provides that "if such original bidder neglects, fails or refuses, for fifteen days after the first publication of the notice of award, to enter into the contract, then the city coun-



cil, without further proceedings, shall again advertise for proposals or bids," etc.

Section 18 provides as follows: "The superintendent of streets is hereby authorized in his official capacity, to make all written contracts, and to receive all bonds authorized by this act, and to do any other act, either express or implied, that pertains to the street department under this act," and setting forth sundry other powers and duties in respect of the contract.

When the board of trustees made its award, its powers and duties in respect of letting the contract ceased. It then became the duty of the superintendent of streets either to cause the contract to be entered into by the original bidder or with the property owners should they elect to take over the work. The statute confers this power and duty upon him, acting, of course, in his official capacity, and it was not necessary for the board of trustees to take further action unless there was a failure on the part of the original bidder to enter into the contract, in which case the city council, under section 13, was directed to "again advertise for proposals or bids." The notice given by the property owners to the board of trustees conferred no rights upon them nor did it impose any duty upon the board of trustees. Somewhat similar provisions to those in the Improvement Act are found in the act of 1889 (Stats. 1889, p. 162). In *Fairchild v. Wall*, 93 Cal. 401, [29 Pac. 60], the superintendent of streets entered into a contract with the property owners after an award had been made to plaintiff. *Mandamus* was sought by plaintiff to compel the city council to enter into a contract with the plaintiff for the work. The writ was denied. As we understand that case, the superintendent of streets let the contract to the property owners without further authority than that conferred by the statute and without any action on the part of the city council other than making the award in the first instance.

Appellants do not rely, nor do we think under the facts shown they could rely, upon the notice given to the superintendent of streets. Their reliance is upon their construction of the statute that upon the election of the property owners being made known to the board of trustees, it became the duty of that body to award the contract to the property owners and to direct the superintendent of streets to enter

into the contract for the work with them. We cannot agree with appellants in their construction of the statute.

2. In copying the contract into the record kept by the superintendent of streets, it was stated that the time for the completion of the contract was within eighty days. Concededly, the work was not completed within that time but was completed within 180 days. Defendant introduced the original contract which showed that the time of completion was within 180 days and the superintendent of streets testified that a mistake was made in copying it into the record. The original contract was on file in his office with other records and was open to inspection, as were other records. The mistake in recording the contract did not affect the lien, for the reason that under the provisions of the Improvement Act of 1911, a lien exists before the making of the record. Plaintiffs must have known of the terms of the award, and in offering to do the work on such terms they must have known the price to be paid.

It was held under the "Vrooman Act," section 10 (Stats. 1885, p. 155), that a failure to record the contract will not prevent recovery. (*Perine v. Lewis*, 128 Cal. 236, [60 Pac. 422, 772].)

3. It is claimed that the assessment is invalid for the reason that the plans which accompanied the specifications for the work indicated that the frontage of plaintiff Wentland's lot was 155.5 feet and that the record of the assessment shows but 152 feet. Also, that in the case of the assessment of Ann M. Phillips, the specifications showed that her lot had 286 feet frontage, whereas the assessment shows 294.51 feet.

The resolution of intention stated that the following work was to be done, to wit: "That Pine Street in said city between the center of Garfield Street and the easterly city limits be improved by grading the same . . . in accordance with the plans and specifications adopted therefor by the board of trustees of said city, October 9, 1914, to which said plans and specifications reference is hereby made for description of said work and further particulars." No mention of lots is made.

The plans and specifications describe the work to be done the same as above, that is, Pine Street between the center of Garfield Street and to the easterly city limits. The

plans attached to the specifications are made part thereof. The blue-print copy of the plans shows on its face that it is "Plan for improvement of East Pine Street, City of Lodi, California, between Garfield Street and the east city limits."

The court found that this blue-print "indicated that the lot belonging to Fred Wentland and which fronts on said street, had a frontage of 155.5 feet, and that the lot of plaintiff Ann M. Phillips, fronting on said street, had a frontage of 286 feet. In fact, the lot of Fred Wentland had a frontage of 152 feet and the lot of Ann M. Phillips had a frontage of 294.51 feet." The certificate of the city engineer states the whole amount each of the grading, paving, curbing, and gutters, assessment No. 4, as made by the superintendent of streets, shows that the assessment is upon certain lots fronting on Pine Street to the easterly city limits, amounting in all to \$3,460.90, and showing "the number of the lot and the amount assessed thereon." Attached to his certificate is a diagram showing the entire line of the work and the lots fronting on Pine Street and the actual frontage of each on which the assessment was made. The Wentland assessment was on 152 feet, his actual frontage, and on 294.51 feet, the actual frontage of Ann M. Phillips' lot. It is not claimed that the entire work done was less than was certified to by the city engineer and superintendent of streets, and it is not contended that the actual frontage of the Phillips lot was less than that assessed. The specifications did not call for the improvement of a certain number of feet in front of each lot fronting on Pine Street or for any specified number of feet. They called for the improvement of the street between certain stated points—from Garfield Street to the easterly city limits, and it was not necessary to state in the specifications the frontage of each lot. The jurisdiction to do the work had its origin in the passage and publication and posting of the resolution of intention. Plaintiff Wentland has no cause for complaint, since he was assessed for less frontage than shown in the specifications and admittedly for his actual frontage. Nor can we see why plaintiff Phillips should escape payment because of the variance between the statement of an immaterial fact in the specifications and in the final certificate of the engineer of the actual length of the improved line of the street and the actual part of that line which was in

front of the Phillips lot. Defendant's obligation was to complete the work as designated in the resolution of intention and this, concededly, it has done. The law fixes the liability of the lot owner, and as no substantial right of any lot owner is shown to have been violated, the contractor should, pursuant to the statute, be paid for his work in accordance with his contract and the resolution of intention.

Section 26 of the act gives the right of appeal to the city council to all interested persons, if aggrieved, within thirty days after the date of the warrant, and the council is given power to "modify or correct the assessment in such manner as to them shall seem just," and the decision of the council is made final on all matters as to which an appeal is given. "No assessment, warrant, diagram or affidavit of demand and nonpayment, after the issue of the same, and no proceedings prior to the assessment, shall be held invalid by any court for any error, informality, or other defect in the same, where the resolution of intention of the council to do the work, has been actually published as herein provided, and said notices of improvement have been posted along the line of the work, as provided in section five of this act, before the passage of the resolution ordering the work to be done."

The law was fully complied with in these particulars. No appeal was taken by any of the property owners at any stage of the proceedings.

Appellants seek to excuse their failure to appeal on the grounds, first, that the defects pointed out appeared on the face of the record and no appeal was necessary as the property owner was not aggrieved, citing *Ryan v. Altschul*, 103 Cal. 174, 176, [37 Pac. 339], and, second, because "the record was inaccessible by reason of being locked up as hereinbefore mentioned, and which appellants offered to prove." We do not think the record shows any invalidity in the assessment on its face or at all. Plaintiffs called Mr. Coleman, superintendent of streets, and made the offer set forth in the early part of this opinion to which objection was sustained. It does not appear, nor did plaintiffs offer to show, that the superintendent of streets was inaccessible and could not be found, or, being found, refused to allow plaintiffs access to the records. Nor does it appear, nor was it attempted to be shown, that plaintiffs had not, or could not, obtain the information necessary to take an appeal; nor does it appear

that they had any intention to appeal, nor that they had any substantial grounds for appeal. On the contrary, as we have seen, the proceedings were regular and without substantial infirmity, and that an appeal, if taken, would have been unavailing.

We fail to discover error in the ruling of the court or that appellants were excused from taking an appeal to the board of trustees if they felt aggrieved.

The judgment is affirmed.

Burnett, J., and Hart, J., concurred.

---

[Civ. No. 2295. First Appellate District.—April 22, 1918.]

**FLORA A. VALENTINE et al., Appellants, v. W. W. HAYES, Respondent.**

**NEGLIGENCE—ACTION FOR DEATH OF EMPLOYEE—CODE PROVISION APPLICABLE—INSTRUCTION.**—In an action brought under section 377 of the Code of Civil Procedure by the surviving wife and children as heirs to recover damages for the death of a carpenter employed on a building in course of construction, and alleged to have been caused by the negligence of defendants, it was not error to instruct the jury that the action was properly brought under that section, and an order granting a new trial in such action on the ground that the instruction was erroneous, and that the jury should have been instructed that the action should have been brought under section 1970 of the Civil Code, and maintained for the benefit of the widow alone, instead of the widow and children, was error.

**ID.—NEW TRIAL—INSUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT.**—In an action to recover damages for the death of a carpenter in falling from a building on which he was employed, where the uncontradicted facts show that the accident was not caused by any improper or faulty or defective construction or dangerous place of work, but solely through the carelessness and negligence of the deceased, an order granting the defendant a new trial is sufficiently supported on the ground of the insufficiency of the evidence to justify the verdict.

**ID.—ORDER GRANTING NEW TRIAL—ERRONEOUS REASON—APPEAL—SCOPE OF REVIEW.**—Where a motion for a new trial is based upon several grounds, and the reason for granting the motion is erroneous, the appellate court is not concluded by such reason, but may examine

the record to determine if the new trial should have been granted on any of the grounds set forth in the notice of intention, except as to the sufficiency of the evidence, where it is conflicting.

**ID.—SAFE PLACE TO WORK—MEANING OF TERM.**—The word "safe" as used in connection with the duty of employers to furnish a reasonably safe place to work does not mean a place so made and guarded that it precludes all possibility of danger, but the word is a relative one, and the safety of the place is to be judged by the nature of the work.

**APPEAL** from an order of the Superior Court of Alameda County granting a new trial. Stanley A. Smith, Judge Presiding.

The facts are stated in the opinion of the court.

Stanley Moore, Geo. K. Ford, and Elliott Johnson, for Appellants.

Watt, Miller, Thornton & Watt, for Respondent.

**KERRIGAN, J.**—This is an action brought to recover the sum of fifty thousand dollars as damages for the death of one Clarence C. Valentine, caused by a fall from a building in course of construction, and alleged to have been due to the negligence of defendants. The action was instituted by Flora A. Valentine as the surviving wife, and by the other plaintiffs as surviving children of the deceased.

Defendant Bickel, the owner of the building, was made a party defendant by reason of the existence of a state statute and a city ordinance making it incumbent upon the contractors for the erection of a building of more than two stories to cover all beams and girders with flooring to prevent workmen from falling more than one floor, and upon the owner where the contractor has neglected to do so.

At the conclusion of plaintiff's case the action was dismissed as to defendant Bickel on her motion for a nonsuit, upon the ground that the evidence showed that this duty was complied with by the contractor, and that the accident occurred in a light-well where there was to be no permanent flooring. The trial then proceeded as to defendant Hayes, the contractor, and resulted in a verdict in favor of plain-

tiffs in the sum of seven thousand five hundred dollars. The action was begun and prosecuted under section 377 of the Code of Civil Procedure, which in substance provides that when the death of a person not being a minor is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death. The trial court so instructed the jury, and upon his motion for a new trial, defendant Hayes urged as one of his grounds in support of the motion that this instruction was erroneous, claiming that in actions for damages where the relation of master and servant existed, section 1970 of the Civil Code was the only section authorizing such action. This section gives a right of action to the widow, children, dependent parents, and dependent brothers and sisters in the order of their precedence therein stated. It was urged that this action should have been maintained for the benefit of the widow alone, and not for the benefit of the widow and children. The trial court concurred in this view of the case, and granted a new trial on the sole ground that the giving of the instruction relating to section 377 of the Code of Civil Procedure constituted error. Subsequent to the perfecting of this appeal the supreme court had occasion to pass upon this very question (*Gonzalves v. Petaluma etc. Ry. Co.*, 173 Cal. 264, [159 Pac. 724]); and it is conceded—as indeed it must be—that the later view of the law adopted by the trial court was incorrect, and that the giving of the instruction on account of which the new trial was granted did not constitute error.

The motion for a new trial, however, was based upon several grounds; and notwithstanding the reason the court below gave for granting the order, we are not concluded by such reason, but have the right from an examination of the record to investigate and determine if the new trial should have been granted upon any of the grounds set forth in the notice of intention, except as to the sufficiency of the evidence where it is conflicting. (*Thompson v. California Const. Co.*, 148 Cal. 35, [82 Pac. 367].)

The main ground relied on here in support of the order is the insufficiency of the evidence to justify the verdict, it being claimed that the evidence shows conclusively and with-

out conflict that the deceased met his death through no fault on the part of the defendant.

We are of the opinion that the record supports this contention. It appears from the evidence that the defendant Hayes was engaged as a contractor to construct a certain building in San Francisco for one Abby Frink Bickel, and that deceased was employed by defendant as a carpenter on such building, where he met with the accident which resulted in his death. In the construction of the building the defendant provided a system of ladders in a light-well for his employees to be used in ascending to and descending from their work. At each floor planks were run across the light-well resting on the window-sills. From these platforms ladders were run, each ladder being one floor in height, running from alternating sides of the light-well. The platforms so constructed were about two feet six inches in width, filling up the entire space in the windows between which they extended, and the boards thereof were two inches thick. The ladders resting upon these platforms were about twenty-two inches wide at the bottom and eighteen inches wide at the top. The platforms were secured by nails, and there is no evidence to show that the system adopted was not strong and substantial and reasonably safe for the purpose for which it was used. At the time deceased received the injuries resulting in his death nothing gave way or broke about the ladders or platforms. The evidence further shows that when the accident happened deceased was going down one of the ladders carrying a lot of tools, with his face outward from the ladder and his back turned thereto, and that he lost his balance and fell, receiving the injuries from which he died.

These facts are without contradiction, and conclusively show that the accident was not caused by any improper or faulty or defective construction or dangerous place of work, but solely through the carelessness and negligence of the deceased. It is true plaintiffs introduced evidence to show that the ladder from which deceased fell was not securely nailed at the top a week after the accident occurred. This testimony was objected to as being too remote, it having appeared in evidence that the ladder had been in continuous use for all of this intervening period by from fifteen to



twenty-five men daily, and might have broken loose from such use. Assuming the evidence to have been properly admitted, however, it can have no weight in the face of the positive and undisputed testimony of several witnesses to the effect that both before and after and at the very time of the accident the ladder was securely fastened.

One of the questions presented was whether or not the deceased was provided with a safe place to work.

The word "safe" as used in connection with the duty of employers to furnish a reasonably safe place to work does not mean a place so made and guarded that it precludes all possibility of danger. Many employments are in themselves dangerous; and it has been said that it involves no paradox to say that a place of danger may be safe in the proper sense of the word. (*Martin v. Des Moines Edison Light Co.*, 131 Iowa, 724, [106 N. W. 359].) In the construction of buildings some places must of necessity present danger. "Safe place to work" is a relative term as to which the word "reasonably" is important; and the safety of the place is to be judged by the nature of the work. (*Saversnick v. Schwarzschild*, 141 Mo. App. 509, [125 S. W. 1192]; *Welch v. Carlucci Stone Co.*, 215 Pa. St. 34, [7 Ann. Cas. 299, 64 Atl. 392].) An absolutely safe place of labor is not required of an employer. It is to be reasonably safe having regard to the character of the work itself.

In *Spivok v. Independent Sash & Door Co.*, 173 Cal. 438, [160 Pac. 565], it is said: "Carpenters walk freely and unhesitatingly and expect to walk over floor joists before the floor is laid. One would not look to see a cause of action for injuries occasioned by an inadvertent slip of a carpenter walking over such floor joists predicated upon the fact that the employer had not caused the floor to be laid so as to make the place of labor safe."

Here no duty was imposed upon defendant to maintain floors in the place of the accident. The evidence to our minds shows conclusively that the proximate cause of the injury was the negligence of deceased in descending the ladder in the hazardous and unusual manner in which he did with his arms filled with tools, and that this act, and not any act or omission of defendant Hayes, was the cause of the injury complained of.

For the reasons given the order granting a new trial is affirmed.

Lennon, P. J., and Beasly, J., *pro tem.*, concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on May 22, 1918.

---

[Civ. No. 2251. First Appellate District.—April 23, 1918.]

WALLACE RUTHERFORD, Plaintiff and Appellant, v.  
MONICA L. OTT et al., Defendants and Respondents;  
LENA McNALLY et al., Defendants, Respondents and  
Appellants.

**TRUST — SETTLEMENT OF ACCOUNT — BROKERS' COMMISSION — SALE OF TRUST PROPERTY—PROPER ITEM.**—A trustee under a trust which bound him to sell the real property of the trust estate and to distribute the proceeds is entitled to have allowed him in his account the usual and reasonable commission paid by him to certain real estate brokers through whose efforts the sale was made, where the trustee made repeated efforts to make the sale himself and was unable to do so.

**ID.—CARE OF CEMETERY PLOT OF TRUSTOR — PAYMENT TO RECTOR OF CHURCH—PROPER ITEM.**—A trustee is entitled to have allowed him in the settlement of his account an amount paid, in accordance with the provisions of the trust, to the rector of a church to insure appropriate care of the cemetery plot of the author of the trust, since such payment did not involve a perpetuity.

**ID.—GIFTS FOR MASSES—VALID PROVISION OF TRUST.**—A provision in a trust for the payment of specified sums of money to certain churches for masses is not void on the ground that the churches had not the legal capacity to take the donations, since the same are gifts to the persons to whom the revenues of the churches are payable or by whom they are controlled and disbursed.

**ID.—GIFTS IN EXCESS OF ONE-THIRD OF ESTATE—VALID PROVISIONS.**—Gifts to charity under a trust created in the lifetime of the trustor which exceed one-third of the trust estate, are not void, since section 1313 of the Civil Code applies only to wills.

APPEALS from a judgment of the Superior Court of Napa County. Henry C. Gesford, Judge.

The facts are stated in the opinion of the court.

Wallace Rutherford, *in pro. per.*, for Appellant.

E. L. Webber, for Appellants and Respondents McNally et al.

James A. Nowland, for Certain Respondents.

Frank M. Silva, for Respondents St. John's Church et al.

LENNON, P. J.—This case arises out of a trust created by Lena Ott in her lifetime. After her death the property of the trust was sold and the trust fully administered. The trustee then brought this suit against the beneficiaries of the trust to settle his accounts and to obtain a judgment directing distribution of the trust assets.

A judgment resulted and two appeals were taken, which are here for determination.

The trustee has appealed from the disallowance of three items in his account:

(1) Two hundred and thirty-one dollars and twenty-five cents paid by him as brokers' commissions upon the sale of real property.

(2) One hundred and fifty dollars paid by him for the care of the cemetery plot of the author of the trust at St. Helena as provided in the trust.

(3) Two hundred and fifty dollars disallowed in respect of the trustee's claim for compensation.

The other appeal is by beneficiaries under the trust who are also heirs at law of the decedent. The trust contained provisions for the payment of certain sums, hereafter to be mentioned, which these appellants claimed to be invalid. The court below held otherwise; hence the appeal.

We shall first take up the appeal of the trustee and deal with the items disallowed below, and then consider the merits of the other appeal.

(1) Under the terms of the trust the trustee was bound to sell the real property of the trust estate and to distribute the proceeds. The trustee attempted to make a sale of the property but was unable to do so, and after repeated endeavors with many prospective purchasers he finally em-

ployed real estate brokers. Through their efforts the sale was made, and the trustee, in good faith, paid them commissions to the amount of \$231.25, which was the usual and a reasonable rate. The court below disallowed this item in conformity with the practice of disallowing commissions established by the learned trial judge to govern the administration of estates of deceased persons in the court over which he presides. The general idea which underlies the custom followed below is a very commendable one, inasmuch as its purpose is to reduce the cost of the administration of estates; but the rule cannot be made an inflexible one, and exceptions thereto must be indulged now and then. In this case we think the evidence shows that the employment of real estate brokers was reasonably necessary, and that the sum paid them by the trustee was a reasonable compensation. The testimony dealing with this phase of the case is not extended, for the reason that no beneficiary made objection to the expenditure, but we think that the evidence, which is uncontradicted, is ample to establish the conclusion reached by us.

(2) The trustee paid to the rector of the Roman Catholic Church at St. Helena, who has charge of the Roman Catholic Cemetery at St. Helena, the sum of \$150 to insure appropriate care of the cemetery plot of the author of the trust. This payment was in accordance with the provisions of the trust. The court below, upon the objection of some of the beneficiaries of the trust, held that this payment was an attempt to create a perpetuity, and therefore invalid. In this we think there was error. Such payments to a cemetery association, or to the person or persons who have charge of the upkeep of a cemetery, do not involve a perpetuity. The payment is made as a consideration for an agreement to give appropriate care to the cemetery plot, and, even if there be an agreement to care for that plot for all time, there is no tying up property giving rise to a perpetuity.

(3) In his account the trustee made claim to compensation in an amount which the court below reduced by \$250. Although the services of the trustee extended over a considerable period of time and were properly and zealously performed, nevertheless, considering the size of the trust estate, we think it was a legitimate exercise of discretion for the court to reduce the compensation by the amount disallowed

This disposes of the questions presented by the appeal of the trustee, and we shall now take up the appeal of the beneficiaries.

By the terms of the trust the trustee was required to pay specified sums of money to specified Roman Catholic churches for the celebration of masses in line with the pious intention of the author of the trust. It is claimed by the beneficiaries that these churches had not legal capacity to take the donations provided for in the trust, but we think the only question involved is the question to whom these donations were made. (*In re Gibson*, 75 Cal. 329, [17 Pac. 438].) "A bequest to a school has been held to be a gift to the schoolmaster; one to a church a gift to the parson and his successors; one to parishioners a gift to church wardens." (See *Domestic and Foreign Mission Societies' Appeal*, 30 Pa. St. 436.)

In line with these obviously correct decisions we hold that a gift to a particular church is a gift to the pastor or rector of that church, or to the vestrymen or trustees of the congregation, or to the presiding elder or bishop, or to any other person or persons to whom the revenues of that particular church are payable or by whom they are controlled or disbursed.

It is conceded by appellants that if the direction had been to make payment to the pastor of the church rather than to the church itself, the direction would have been valid. (*Estate of Lennon*, 152 Cal. 327, 330, [125 Am. St. Rep. 58, 14 Ann. Cas. 1024, 92 Pac. 870].)

The conclusion thus reached by us makes it unnecessary to here deal with the question whether gifts for masses, oftentimes in line with special intentions of donors and which are gifts for the promotion of divine worship, do or do not give rise to charitable trusts, which are defined to involve gifts for the benefit of an indefinite number of persons, either by bringing their hearts and minds under the influence of education or religion, or otherwise contributing to the betterment of their bodies or minds. These questions have been before the courts (*Estate of Lennon*, 152 Cal. 327, [125 Am. St. Rep. 58, 14 Ann. Cas. 1024, 92 Pac. 870]; 11 C. J. 322; 2 Coffey, 165), but the position of the appellants has been otherwise met, and we need not now discuss the question just stated.

It is also argued that the gifts to charity under the trust exceed one-third of the trust estate. Without stopping to decide the question of fact thus presented, we hold that the provisions of section 1313 of the Civil Code apply only to wills (*Bowdoin College v. Merritt*, 75 Fed. 480), and therefore do not apply to the trust here involved. Furthermore, it is clear that this trust cannot be said to be testamentary in character. (*Tennant v. Tennant*, 167 Cal. 570, 577, [140 Pac. 242].)

This disposes of the appeal by the beneficiaries.

As a result of the views expressed, we order that the judgment be reversed, with directions to the lower court to allow to the trustee the two items above mentioned, \$231.25 and \$150, with his costs of appeal, and that in all other respects the judgment be affirmed.

Beasley, J., *pro tem.*, and Kerrigan, J., concurred.

---

[Crim. No. 588. Second Appellate District.—April 23, 1918.]

THE PEOPLE, Respondent, v. PETER GASTONE,  
Appellant.

CRIMINAL LAW—MISCONDUCT OF DISTRICT ATTORNEY—DENIAL OF MOTION FOR NEW TRIAL—FINDINGS ON CONFLICTING EVIDENCE—APPEAL. In denying a motion for a new trial in a criminal action, the findings on conflicting evidence as to the alleged misconduct of the district attorney must prevail on appeal.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a motion for a new trial. Paul J. McCormick, Judge.

The facts are stated in the opinion of the court.

John L. Richardson, and T. E. Parke, for Appellant.

U. S. Webb, Attorney-General, and Joseph L. Lewinsohn, Deputy Attorney-General, for Respondent.

CONREY, P. J.—Defendant was convicted of the crime of grand larceny. He appeals from the judgment and from an order denying his motion for a new trial.

On behalf of appellant it is claimed that the verdict is contrary to the evidence in that the evidence is not sufficient to support the verdict; that the verdict is "contrary to law in that the evidence taken does not establish as matter of law that the defendant committed the offense found by the jury by the verdict." These contentions are without merit. The testimony of the complaining witness fully described the facts constituting the crime charged and identified the defendant as the guilty person. Our attention is not directed to any errors claimed in the course of the trial, either in the reception or rejection of evidence or in the instructions given to the jury. The facts found as indicated by the verdict of the jury are entirely sufficient to establish the commission of the offense by the defendant.

The only other point made in support of the appeal relates to alleged misconduct on the part of the district attorney at the trial of the case. The defendant testified as a witness in his own behalf. In giving that testimony he stated that at the time of his arrest the complaining witness, Eppick, was present; that Eppick took a picture from his pocket and said, "He is the man." On cross-examination of the defendant the district attorney showed to the witness a photograph and asked if that was the picture which he saw at the time referred to in his direct testimony, and if he had seen that picture before. The witness having replied in the negative to these two questions, the district attorney asked, "Do you know whose picture that is?" The witness replied, "That is me." The district attorney then offered the picture for "identification," but it was not received in evidence and was not referred to any further during the trial.

The defendant moved for a new trial on various grounds, including that of misconduct of the district attorney prejudicial to the defendant occurring during the progress of the trial. In support of this motion affidavits were introduced with respect to the conduct of the district attorney at the time of the above-mentioned cross-examination of the defendant with reference to the photograph. The photograph of the defendant did not show him in prison garb, but it

did have across the breast in plain figures the number, 15,545. In one of the affidavits the affiant referred to a conversation which he said he had with the deputy district attorney after the trial of this case, in which, according to affiant, the deputy district attorney said "that something was brought out on direct examination by counsel for defendant and that he [the said deputy district attorney] had a picture in his file of the defendant taken while the defendant was in custody and that it had a big prison number on it, and that he took the picture and held it in his hand, with the back of his hand toward defendant's attorney and to the court and to the court reporter, but in plain view of the jury; that he held it that way until he walked up to the defendant and asked him the question, 'Is that your picture?'; that upon defendant answering that it was, the deputy district attorney turned to the clerk and asked that it be marked for identification, but that he never intended to introduce it and he never did." The deputy district attorney testified in response to this and the other affidavits which were offered in support of the motion for a new trial, and positively denied the facts thus charged against him. In passing upon the motion for a new trial the court found in favor of the district attorney with respect to the charges involving his alleged misconduct. In view of the conflicting evidence presented, the conclusion of the trial court as to those matters must prevail here.

The judgment is affirmed and the order denying the defendant's motion for a new trial is affirmed.

James, J., and Works, J., *pro tem.*, concurred.

---

[Civ. No. 1841. Third Appellate District.—April 24, 1918.]

SAMUEL EWING, Respondent, v. RICHVALE LAND COMPANY (a Corporation), et al., Appellants.

**MORTGAGE—ACTION FOR FORECLOSURE—DEFICIENCY JUDGMENT—LIMITATION TO DEFENDANTS PERSONALLY LIABLE FOR DEBT.**—In an action for the foreclosure of a mortgage, the deficiency judgment contemplated by section 726 of the Code of Civil Procedure can only be



docketed by the clerk against the defendant or defendants personally liable for the debt.

**ID.—SUFFICIENCY OF JUDGMENT—EXPRESS RECITAL OF PERSONAL LIABILITY UNNECESSARY.**—In an action for the foreclosure of a mortgage it is not necessary that the judgment should in express terms state that the defendant is personally liable for the debt in order to warrant the docketing of a deficiency judgment against him, if such fact clearly appears from the findings and judgment; and a judgment against defendant in a named sum is equivalent to a judgment that defendant is personally liable for the amount found due and to authorize the entry of a deficiency judgment against him.

**APPEAL** from a judgment of the Superior Court of Butte County. H. D. Gregory, Judge.

The facts are stated in the opinion of the court.

J. Oscar Goldstein, for Appellants.

James A. McGregor, and Karl C. Partridge, for Respondent.

**CHIPMAN, P. J.**—This is an appeal by defendant Richvale Land Company from a deficiency judgment entered by the clerk of the superior court on the coming in of the commissioner's return in an action to foreclose a mortgage executed by appellant to plaintiff.

It is alleged in the complaint in the action: That the defendant company executed and delivered to plaintiff two certain promissory notes each for \$4,593; that plaintiff is the owner and holder of said promissory notes, neither of which, nor any part thereof except certain interest on one of said notes, has been paid; that to secure payment of said notes defendant company executed and delivered to plaintiff its mortgage on certain described land, describing it, which was duly acknowledged and recorded; that defendant Jones claims some interest in said land, but that such interest is subordinate to said mortgage; that by the terms of said mortgage a reasonable attorney's fee was allowed for the foreclosure, should foreclosure become necessary.

Upon the foregoing averments the prayer of the complaint is: That plaintiff have "judgment against defendant [Richvale Land Company] in the sum of"—stating the amount of each note together with interest thereon; for attorney's

fees in the sum of one thousand dollars; that "said mortgage be foreclosed and that each of said defendants and all persons claiming under them or either of them may be foreclosed of all right . . . and that the usual decree may be made . . . for the sale of said mortgaged premises by the sheriff . . . or by a commissioner to be appointed by said court, and that the proceeds of said sale may be applied to the payment of said note, interest, attorney's fee and costs of suit and sale"; that each of said defendants and all purchasers subsequent to the execution of said mortgage be foreclosed of all, etc., "and that plaintiff may have judgment and execution against the defendant Richvale Land Company, a corporation, for any deficiency which may remain after applying all the proceeds of the sale of said property properly applicable to the satisfaction of the said judgment"; that plaintiff may become the purchaser at such sale.

The rights of defendant Jones are not involved and he does not appeal.

The answer of defendant Richvale Land Company admits all the averments of the complaint except as to attorney's fees, and as to that the denial is that one thousand dollars is a reasonable fee. The cause came on for trial December 21, 1915, and a minute order was made, which stated, among other things: "Matter submitted to the court and the court orders that a decree be entered for the plaintiff of foreclosure and counsel fees at five hundred dollars." On the twenty-fifth day of February, 1916, the court made and entered its decree. It is entitled, "Decree of Foreclosure"; recites that the cause came on to be heard December 21, 1915, both oral and documentary evidence was submitted, and "the court now finds the following facts"; that defendant Richvale Land Company is a corporation duly organized; that it executed and delivered to plaintiff the promissory notes set out in the complaint, and "that the plaintiff ever since has been and still is the owner and holder of said promissory notes and that neither the sum mentioned therein, nor any part thereof, has ever been paid," nor any interest except as stated; that defendant Richvale Land Company executed the mortgage mentioned in the complaint to secure payment of said notes and described the property mortgaged; that said mortgage provided for the payment

of a reasonable attorney's fee, which is found to be five hundred dollars (the finding as to defendant Jones is immaterial).

The findings of fact here end. It is then stated: "It is hereby ordered, adjudged and decreed that a judgment be entered against the defendant Richvale Land Company in the sum of \$4,593, with interest at the rate of ten per cent per annum from the first day of March, 1914, and for the sum of \$4,593, with interest at the rate of six per cent per annum from the first day of March, 1913, to the first day of March, 1915, and at the rate of ten per cent per annum from the first day of March, 1915. For attorney's fees in the sum of five hundred dollars and for all costs of suit and sale." It is further stated: "That said mortgage be foreclosed and that said defendant Richvale Land Company, a corporation, be foreclosed of all right, claim, or equity of redemption of its interest in said mortgaged premises, or any part thereof, and that John Myers be and he is hereby appointed a commissioner to conduct said sale and apply the proceeds thereof to the payment of said notes, interest, attorney's fees, and costs of suit and sale and that before qualifying as such commissioner, the said John Myers give a bond in the sum of one hundred dollars." The commissioner duly made return of his proceedings, from which it appeared that there was a deficiency of \$6,617.30 after disposing of the proceeds of the sale in accordance with the decree. The clerk made the following entry in judgment docket: "Judgment for deficiency of \$6,617.30 as shown by commissioner's return of sale."

It will appear from the foregoing that the findings of fact are a part of the decree and that no conclusions of law as such are stated. In the paragraph, immediately following what purport to be findings of fact, is the order and decree. There is no provision in the decree for entering a deficiency judgment.

It is upon this condition of the record that appellant makes the following contentions: "1. Section 726 of the Code of Civil Procedure, providing for foreclosure of mortgages of realty, does not give the clerk power to docket a deficiency judgment unless a judgment is entered adjudicating the defendant personally liable for the debt. 2. The mere recital, preceding the judgment, or as contained in the judg-

ment and decree of the court, that judgment be entered against defendant Richvale Land Company in the amount of the debt sued for, with interest, costs, and counsel fees, is not the entry of a judgment that defendant Richvale Land Company is personally liable for the debt, or permitting a deficiency judgment to be docketed by the clerk against them."

The provision of section 726 touching the question here is as follows: "If it appear from the sheriff's return, or from the commissioner's report, that the proceeds are insufficient, and a balance still remains due, judgment must then be docketed by the clerk in the manner provided in this code for such balance against the defendant or defendants personally liable for the debt, and it becomes a lien on the real estate of such judgment debtor, as in other cases in which execution may be issued."

It is undoubtedly true, and the cases all so hold, that the deficiency judgment contemplated by section 726 can only be docketed by the clerk "against the defendant or defendants personally liable for the debt," for such is the express language of the statute. (*Scamman v. Bonslett*, 118 Cal. 93, [62 Am. St. Rep. 226, 50 Pac. 272]; *Herd v. Tuohy*, 133 Cal. 55, [65 Pac. 139]; and among the earlier cases may be cited *Cormerais v. Genella*, 22 Cal. 116; *Leviston v. Swan*, 33 Cal. 480.) In the case last cited the court stated what is still true, for the forty-sixth section of the Practice Act was substantially the same, so far as concerned the deficiency judgment, as is section 726 as we now have it. The court, speaking of the judgment in a foreclosure case, said: "All that it need or should contain is a statement of the amount due the plaintiff, a designation of the defendants who are personally liable for the payment of the debt, and a direction that the mortgaged premises, or so much thereof as may be necessary, be sold according to law and the proceeds applied to the payment of the expenses of the sale, the cost of the action, and the debt. Nothing further is required. All else is ministerial and is expressly regulated by the statute, which is not made clearer or more binding by being copied into the judgment. . . . Under our system, the sheriff is furnished with a certified copy of the judgment. Armed with this process, he proceeds to sell the mortgaged property in the mode and manner, and at the place designated in the

Practice Act for the sale of real estate under judicial process, and makes return of his proceedings as in a case of an execution upon a money judgment. If it appears from the return that the amount due the plaintiff has not been fully paid by the sale, the clerk then docketts the judgment, for the balance due, against those defendants named in the judgment as being personally liable for the payment of the debt, without any order from the court."

*Herd v. Tuohy*, 133 Cal. 55, [65 Pac. 139], is relied on by appellant. That was a foreclosure case in which the defendant recovered judgment against the plaintiff for the foreclosure of a mortgage. It was stated by the court in its opinion: "In the judgment as originally entered, there was no adjudication that the plaintiff was personally liable, or provision for a deficiency judgment against him." On an *ex parte* application of defendant's attorneys, the judgment was amended by adding thereto a paragraph adjudging the plaintiff to be personally liable on the mortgage, and that on the commissioner's return of the sale, deficiency judgment should be docketed against him; and accordingly such a judgment was docketed against him. This action was brought to obtain relief against this judgment as amended and the deficiency judgment entered thereon and resulted in a judgment for plaintiff, in effect canceling both judgments. The appeal was from this judgment. Among other points, appellant urged: "That the complaint does not purport to set forth all of the original decree, and *non constat* that it was sufficient to authorize a deficiency judgment." Said the court: "As to the second point, the complaint purports to set out the whole judgment, but in fact, as appears from the findings, does not do so. But the omitted portions contain no provision for a deficiency judgment; nor is there any adjudication that the plaintiff (then defendant) was personally liable, unless, as claimed by appellant, the following recital may be so considered, viz.: 'That the interest on said note to November 30, 1895, has been paid; that no other part of said note, principal or interest, has been paid; and there is now due and owing to the plaintiff from the defendants John Herd, Jr., and R. Linder on said note the sum of \$91,101.85, etc., and that the said defendants John Herd, Jr., and R. Linder are personally liable . . . for said sums so found due from them to plaintiff as aforesaid.'

But this is merely the recital of a fact preceding the actual judgment, and cannot be regarded as an adjudication of personal liability; which alone could authorize the clerk to docket a judgment for deficiency"; citing cases. In that case it will be observed that there was found as fact what amounted to a liability on the part of defendants Herd and Linder, but the finding was not followed by an adjudication of personal liability. In the present case the complaint set out the indebtedness and called for a deficiency judgment. The answer admitted the averments of the complaint. The court, in its findings, found the amount due on the promissory notes to plaintiff from defendant Richvale Land Company and that no part thereof had been paid except certain interest on one of the notes. Upon the findings the court entered judgment against the defendant Richvale Land Company in the sum so found to be due plaintiff. Herein lies the important feature distinguishing it from the case of *Herd v. Tuohy* relied upon by defendant. In that case the recital was but a finding of fact and was not followed up, as was done in the present case, by an adjudication and judgment. It was not necessary that the judgment should in express terms state that defendant Richvale Land Company is personally liable for the debt. It is sufficient if from the findings and judgment such fact clearly appears. Judge Sanderson in *Leviston v. Swan*, 33 Cal. 480, pointed out all that the judgment need contain. "All else," he said, "is ministerial and is expressly regulated by the statute which is not made clearer by being copied into the judgment." (See *Hooper v. McDade*, 1 Cal. App. 733, 739, [82 Pac. 1116].) In *MacNeil v. Ward*, 2 Cal. Unrep. Cas. 174, the court said: "The judgment in this case is not amenable to the criticism of counsel for appellant, that it is erroneous because there is no direction in it that a judgment be docketed for deficiency. In this respect it [the judgment] accords with *Leviston v. Swan*, 33 Cal. 480, where the question is considered and correctly determined. The only point in which the judgment seems to be defective is in not expressly adjudging that Ward is personally liable to the plaintiff for the money found to be due. This is inferentially done." The court directed that on the going down of the *remittitur*, the judgment be amended, "inserting the words remedying this defect, and as thus modified, the judg-

ment will stand affirmed." The record of the case does not give the form of the judgment, and it may not have except as the court said, "inferentially" adjudged that Ward was liable for the debt. Here there is a distinct adjudication and judgment "against the defendant Richvale Land Company in the sum of," etc. It seems to us that this is the equivalent of saying that defendant Richvale Land Company is personally liable to the plaintiff for the money found to be due and is sufficient. By no possibility could there have been a liability other than by defendant company. The statute does not prescribe the form of the judgment. All that it requires is that it shall appear from the judgment that the defendant is personally liable for the debt, and we think that this may appear without in express terms adjudging the defendant to be personally liable. Language used which unmistakably means this should be held to be and, we think, is sufficient.

The judgment is affirmed.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 20, 1918.

---

[Civ. No. 2311. First Appellate District.—April 24, 1918.]

**JAMES IRVINE, Appellant, v. POSTAL TELEGRAPH-CABLE COMPANY (a Corporation), Respondent.**

**CONTRACT — GRANT OF RIGHT OF WAY TO TELEGRAPH COMPANY — TELEGRAPH PRIVILEGES AS CONSIDERATION — BREACH — MONEY OBLIGATION.** Where a contract between a property owner and a telegraph company granting to the latter a right of way over the lands of the former provided that the consideration for the grant was "telegraph privileges to the amount of one thousand five hundred dollars, which said amount shall be taken in the use of telegraph privileges at the usual and ordinary rates," on the failure of the company to issue to such grantor any telegraph franks or allow him any telegraph privileges, by reason of the passage of laws prohibiting telegraph companies from issuing franks for any consideration except

cash, the contract, in view of section 1451 of the Civil Code, became one to pay the sum of money designated as the consideration for the privileges granted by the contract, since the amount of money named in the contract was the exact equivalent of the value of the privileges which the obligor was compelled to furnish.

Id.—PROHIBITION OF FRANKING PRIVILEGE—STATE PUBLIC UTILITIES ACT—PRIOR CONTRACT UNAFFECTED AS TO INTRASTATE MESSAGES.—The State Public Utilities Act prohibiting telegraph companies from issuing franks for any consideration, except cash, does not impair the validity of a contract granting a right of way in consideration of telegraph privileges executed prior to the passage of such act, in so far as the furnishing of franks for intrastate messages is concerned, in view of section 10, article I, of the federal constitution prohibiting any state from passing a law impairing the obligation of contracts.

Id.—ILLEGALITY OF CONTRACT AS TO INTERSTATE MESSAGES—VALIDITY AS TO INTRASTATE MESSAGES—SEVERABLE CONTRACT.—A contract providing for the furnishing of franking privileges in consideration of the grant of a right of way, which became void as to interstate messages by the passage of the Interstate Commerce Act, is not also void, as to intrastate messages, since the contract as to interstate and intrastate messages was clearly separable in fact and law.

Id.—ACTION ON QUANTUM MERUIT—VALUE OF RIGHT OF WAY—CONTINUANCE IN POSSESSION—PLEADING—SUFFICIENCY OF COMPLAINT.—In an action against a telegraph company on a *quantum meruit* for a right of way granted it for a pole line after the consideration for the grant had become partly illegal, the complaint is not subject to the objection that it failed to allege that defendant continued in possession after a stated date, where it is alleged that the value of the right of way and the use and enjoyment thereof up to that date was one thousand five hundred dollars.

Id.—ILLEGAL CONTRACT—SUBSEQUENT LEGISLATION—RULE AS TO PARTIES IN *PARI DELICTO* INAPPLICABLE.—The rule that where parties to an illegal contract are in *pari delicto*, the court leaves them as it finds them, does not apply where the contract was a legal, just, and equitable one when made, but has become unlawful in part by subsequent legislation.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Guy C. Earl, and W. H. Spaulding, for Appellant.

Willard P. Smith, and Berkeley B. Blake, for Respondent.



LENNON, P. J.—This is an appeal from a judgment following an order sustaining defendant's general demurrer to plaintiff's second amended complaint.

The complaint alleges the execution of a written contract on April 29, 1893, between the plaintiff and defendant's predecessor in interest, the Pacific Postal Telegraph-Cable Company, and the assignment of the contract by the Pacific Postal Telegraph Company to defendant; that by the terms of the contract plaintiff granted to the Telegraph Company a right of way and easement to construct and maintain poles for telegraph lines across his property. The alleged consideration for the said grant was the sum of one thousand five hundred dollars cash, the defendant to have the privilege, however, of paying in telegraph franks to that amount. The contract, which was attached to the complaint and made a part thereof, provided that the consideration for the rights and privileges was to be "telegraph privileges over the lines of the said party of the second part upon what is known as the Pacific Coast lines to the amount of one thousand five hundred dollars, which said amount of one thousand five hundred dollars shall be taken in the use of telegraph privileges at the usual and ordinary rates." It is further alleged that the plaintiff performed all of the obligations on his part to be performed, but that the defendant since the month of September, 1913, failed to issue to plaintiff any telegraph franks or allow him any telegraph privileges, and that the only consideration ever received by him was and is telegraph privileges of the value of \$500.26; that the right of way granted to defendant is upward of nine miles in length and extends across valuable lands of the plaintiff; and that said right to erect and maintain telegraph poles and wires, with the right of ingress and egress across plaintiff's said lands, was on the twenty-ninth day of April, 1893, ever since has been, and now is, of the reasonable value of one thousand five hundred dollars cash; that the actual use and enjoyment by the defendant and its predecessor in interest of the said rights and easement from said twenty-ninth day of April, 1893, to the commencement of this action was and is reasonably worth the sum of one thousand five hundred dollars; and as a result of defendant's failure to issue any franks since September, 1913, plaintiff has been

damaged in the sum of \$999.74. The prayer of the complaint is that defendant be required to issue telegraph franks and to grant plaintiff telegraph privileges in accordance with the agreement of the value, at the usual rates, of \$999.74, or that defendant be ordered and directed to pay plaintiff cash in said sum, and for such other or additional relief as the facts would warrant.

In support of the order sustaining the general demurrer, it is argued that the law, both federal and state, enacted and in force since the execution of the contract in controversy, prohibited telegraph companies from issuing franks for any consideration whatsoever except cash; that therefore defendant is excused and relieved from any obligation to furnish further franks to plaintiff; and that no consideration other than franks can be required of defendant under the terms of the contract. This position is untenable under the construction of the contract compelled by the weight of authority, namely, that by its terms the contract in question is in effect in the alternative, and, secondly, because intrastate messages are not prohibited either by the state or federal laws.

The contract provides that the consideration for the rights granted by said agreement is "telegraph privileges . . . to the amount of one thousand five hundred dollars, which said amount shall be taken in the use of telegraph privileges at the usual and ordinary rates." Upon the failure of the obligor to deliver telegraph franks when needed and requested the contract, in our opinion, became one to pay the sum of money designated as the consideration for the privileges granted by the contract, and this is so, we think, because the amount of money named in the contract was the exact equivalent of the value of the telegraph privileges which the obligor was compelled to furnish.

In the case of *Marshall v. Ferguson*, 23 Cal. 69, the obligation was "to pay \$650 in grain at the market price" on a certain date. The court said: "It was not an agreement to deliver any specified parcel or quantity of grain, but he [the obligor] was to deliver a sufficient quantity which, at the market price, would amount to the sum of \$650. . . . Under these circumstances it was the duty of the defendant to deliver the grain on or before the day named to the plaintiff,

and his failure to do so made him liable to pay the sum named in money."

In the case of *Beckwith v. Sheldon*, 168 Cal. 742, [Ann. Cas. 1916A, 963, 145 Pac. 97], the obligation was "to convey . . . the sum of fifty thousand dollars in bonds . . . at par." The court, construing this to be a provision for performance in the alternative, said: "Looking to the terms of the agreement, it is easily seen that it is not a mere agreement for the delivery of the bonds. The promise is that 'there shall be paid to' Beckwith 'the sum of fifty thousand dollars.' This is not an agreement to sell or deliver bonds, but a promise to pay money. The addition of the words 'in bonds of the . . . company at par' does not change it into an agreement solely for the delivery of the bonds, but merely gives the payer the option or privilege of making such payment by delivering the bonds as specified when the time of performance has arrived."

We see no difference in principle between the contracts construed in the two cases last cited and the contract in suit here. If, therefore, the obligation to pay "telegraph franks up to the amount of one thousand five hundred dollars at the usual and ordinary rates" is an alternative obligation and gives the obligor an election up to the time of payment (the time of payment being from time to time as the franks are needed by plaintiff), and conceding, as the defendant contends, that the obligation to issue the franks has become unlawful, then the alternative obligation to pay the coin stands alone. (Civ. Code, sec. 1451.)

The federal constitution does not prohibit Congress from making laws which impair the obligations of contracts (8 Cyc. 929), but it does provide that "No state shall . . . pass any . . . law impairing the obligation of contracts." (U. S. Const., art. I, sec. 10.) The contract here involved when made was lawful, and while Congress may pass an interstate commerce act which would impair the obligation of the contract in so far as it relates to interstate messages, still there remain the intrastate messages within the state of California covered by the contract which would not be affected by the Interstate Commerce Act (Act Cong. Feb. 4, 1887, c. 104, 24 Stat. 379), and which could only be affected, if at all, by the State Public Utilities Act (Stats. 1911 (Ex. Sess.), p. 18). With respect to that act our supreme court has held that "There is still the

constitution of the United States—the supreme law of this state, supreme over its constitution and over its legislature; and of no protection accorded by that instrument to a litigant before this court can that litigant be deprived. Therefore, if it shall be that among the powers conferred by the legislature upon the railroad commission are those whose exercise by that commission do violence to a petitioner's rights under the constitution of the United States, protection under that constitution will be awarded him." (*Pacific Tel. & Tel. Co. v. Eshleman*, 166 Cal. 640, [Ann. Cas. 1915C, 822, 50 L. R. A. (N. S.) 652, 137 Pac. 1119].) It is still legal, therefore, to issue under the contract in question telegraph franks for intrastate messages.

It is urged that the contract is not enforceable as to the intrastate messages if void as to the interstate messages, because the contract is entire and inseparable. This point is not well taken, for inter and intrastate messages are clearly separable in fact and in law. They constitute distinct classes of messages and are governed by distinct bodies of laws—the one being governed by the laws of the United States, and the other governed by the laws of the state within which the message is to be conveyed. The pleadings allege the failure and refusal of the defendant to issue franks or allow privileges for intrastate messages and, as the contract might be enforced and plaintiff allowed to receive his consideration in the form of intrastate messages—a perfectly feasible and practicable procedure—the complaint, in this particular, at least, states a cause of action upon the contract.

But apart from these considerations, the prayer of the complaint asks for general relief, and the facts alleged are sufficient, in any event, to constitute a cause of action for recovery of the reasonable value of the rights granted. The complaint alleges that the reasonable value of the privileges granted has at all times been, and now is, one thousand five hundred dollars. Facts are alleged to support this claim, and it is averred that the only consideration ever received by plaintiff for the same was \$500.26 worth of franks; that plaintiff has actually suffered damage by reason of the refusal to issue franks or to pay any other consideration for the granted rights and easements, such damage being in the sum of \$999.74.

Defendant contends that the complaint fails to state a cause of action on a *quantum meruit* because it fails to allege that

defendant continued in possession after September, 1913. This contention is without merit. The complaint alleges that the value of the right of way and the use and enjoyment thereof by the defendant and its predecessor up to September, 1913, was one thousand five hundred dollars. Consequently the failure to allege that defendant continued in possession after September, 1913, does not militate against the sufficiency of the complaint when tested by a general demurrer.

Defendant further contends that, where a contract is illegal, there can be no recovery for the reasonable value of the property transferred under it, and in this behalf cites a number of cases where the contract involved, at the time it was made, was contrary to an express provision of law, or to good morals. The rule that where parties to an illegal contract are in *pari delicto* the court leaves them as it finds them does not apply in the present case, where the contract was a legal, just, and equitable one when made, but which has become unlawful in part by subsequent legislation. To deny recovery for property conveyed under a contract legal when made, and legal when the property was conveyed, but which by reason of a change in public policy has become unlawful, would be to take property without due process of law.

For the above reasons, the judgment is reversed, with directions to the lower court to overrule the demurrer and require the defendant to answer.

Kerrigan, J., and Beasly, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 20, 1918.

[Civ. No. 2365. First Appellate District.—April 25, 1918.]

**WILLIAM C. OSBORN, Respondent, v. HENRY COWELL LIME AND CEMENT COMPANY (a Corporation), Appellant.**

[Civ. No. 2366. First Appellate District.—April 25, 1918.]

**J. T. LONG, as Administrator, etc., et al., Respondents, v. HENRY COWELL LIME AND CEMENT COMPANY (a Corporation), Appellant.**

**LANDLORD AND TENANT—SIGN PRIVILEGE—ROOF OF ENTIRE BUILDING—CONSTRUCTION OF LEASE.**—An agreement to lease a one-story building with the exception of the space leased to a third party as a saloon, "lessees to have the exclusive right to the roof for sign space, for which privilege they agreed to keep the roof in good order and repair," includes the space on the roof over the saloon.

**ID.—ACTION FOR BREACH—INTERPRETATION OF AGREEMENT—STATEMENTS INADMISSIBLE.**—In an action by the lessees against the owner for failure to execute the lease in accordance with such agreement, evidence of conversations between the lessees of the saloon and the plaintiffs, wherein the former had told the latter that his lease included sign privileges over the saloon, was properly disallowed.

**ID.—DEMAND FOR LEASE.**—Where it was plain that a demand for the execution of the lease in accordance with the agreement would have been futile, no demand on the part of plaintiffs was necessary.

**ID.—FURNISHING OF SATISFACTORY BONDSMEN—MATURITY OF OBLIGATION.**—Where, under such an agreement, the plaintiffs were to furnish satisfactory bondsmen as security for the performance of the covenants of the lease, the obligation to do so did not ripen until the defendant was ready to execute the lease in accordance with the agreement.

**ID.—RESCISSION OF ENTIRE CONTRACT—RIGHT OF LESSEES.**—Under such an agreement, the refusal of the owner to execute a lease for the entire roof justified a rescission of the whole contract.

**ID.—RECOVERY OF BROKER'S COMMISSIONS—FAILURE TO ENTER INTO SATISFACTORY LEASE—DEFENSE NOT MAINTAINABLE.**—In an action by brokers for their commission for negotiating such a lease, the owner will not be heard to say that a satisfactory lease was not entered into.

APPEALS from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

Mastick & Partridge, for Appellant.

Walter H. Linforth, and Leo Kaufmann, for Respondents.

BEASLY, J., *pro tem.*—The above-entitled cases are here upon the same transcript and were argued in the same briefs.

The case of Long et al. against the Cement Company will be considered first.

The defendant, Henry Cowell Lime and Cement Company, agreed to execute a lease to J. O. Long and Herman Wobber of a certain piece of property situated between Sacramento, Market, East, and Commercial Streets, in the city of San Francisco, and the agreement to execute this lease contained the following provisions, namely: The company agreed to lease to Long and Wobber "that certain one story and basement reinforced concrete building to be erected on that certain lot owned by the Henry Cowell Lime and Cement Co., situated on Sacramento, Market, East and Commercial streets, with the exception of the space leased to J. Welsh as a saloon, as outlined in yellow on a certain blue-print floor plan revised July 7, 1913, and marked 'Exhibit A' and attached hereto and made a part hereof." This agreement contained the following further provision: "Lessees to have the exclusive right to the roof for sign space, for which privilege they agree to keep the roof in good order and repair."

These are the vital provisions of this agreement so far as the decision of this case is concerned.

When the time came for the execution of the lease the defendant refused to let to the plaintiffs that portion of the roof of the building over Welsh's saloon. It claimed then and claims now that this agreement was to lease only the part of the roof situate over the portion of the building to be let to plaintiffs. The part of the roof over the saloon was by far the most valuable for sign purposes, as it was over the corner of Market and East Streets. The court found generally that

the defendant refused to execute the lease in accordance with its agreement.

The main point in controversy between the parties at the trial, and during negotiations carried on after the execution of the contract with a view to agreeing upon the terms of the lease, was over the question whether the sign space above the saloon should be included in the lease or not. This finding of the court was tantamount to a finding that the defendant refused in this respect to carry out the terms of its agreement. It claims that it did not so refuse, and that this finding is not supported by the evidence.

The defendant presented two written leases to the plaintiffs in both of which it reserved to itself this roof space over the saloon, and the presentation of the last of these two leases was accompanied by a demand in writing that the plaintiffs enter into the lease as presented. Besides this, from the beginning to the end of these negotiations over the form of the lease the attorney acting for the defendant, who carried on all these negotiations, insisted that the plaintiffs could not have this space above the saloon. He so insisted in polite language but nevertheless with emphasis and finality. The finding is, therefore, supported by the evidence.

The truth is plain that the defendant was of the opinion that the agreement it had made did not include this space on the roof over the saloon, and it acted upon this opinion. This view is still adhered to, but is a mistaken one. Nothing could be clearer than this agreement. It provided for the exclusive possession of the roof of the entire building for advertising purposes, and the exclusive care of the roof by the plaintiffs in consideration therefor.

The language of the agreement being clear and unambiguous, the questions asked by defendant of Welsh as to conversations with plaintiffs with reference to the portion of the roof over his saloon, and whether he had told them that his lease included sign privileges over the saloon, offered by defendant for the purpose of assisting the court in interpreting the agreement, were incompetent and properly disallowed, in that the evidence thus sought to be introduced tended to vary the terms of a written instrument the language of which is clear.

It being plain that a demand for the execution of a lease in accordance with the terms of the defendant's agreement would have been futile, no demand on the part of plaintiffs



was necessary; besides, the defendant assumed the burden of drafting and presenting the lease. The plaintiffs constantly requested a lease including the exclusive sign privilege of the roof. The defendant, as the trial court found, refused to accede to this demand, and nothing further was required to put it in default.

The agreement provided that the plaintiffs should furnish to the defendant satisfactory bondsmen for a sum equal to one year's rental as security for the lease. It is claimed that these sureties were never offered, but the obligation of the plaintiffs to furnish bondsmen did not ripen until the defendant was ready to execute a lease in accordance with its agreement, and this it was never ready or willing to do. Besides, the defendant having refused to execute such a lease, and thereby broken its contract, no further step was necessary to place it in default. Moreover, the court found that the plaintiffs were ready, willing, and able to enter into the lease upon the terms of the agreement at all times. This included of necessity ability, willingness, and readiness to furnish the securities provided in this agreement. The names of two sureties were presented to the defendant. It never actually rejected these sureties; and while there is a conflict of evidence as to their financial standing, the record is not without evidence that they were worth the sum required of them. The provisions of this contract were fulfilled if sureties sufficiently responsible as to be satisfactory to a reasonable person were offered to the defendant. (*Gladding, McBean & Co. v. Montgomery*, 20 Cal. App. 279, [128 Pac. 790].)

It is contended that the evidence does not support the finding as to damages to the plaintiffs. Without reciting the evidence on this, it may be said that there was an abundance of testimony showing a greater amount of damages than the trial court awarded.

Lastly, the defendant claims that the finding of an absolute refusal on its part to include the portion of the roof over Welsh's saloon would not justify a rescission of the whole contract, because the breach of such a condition is readily compensable in damages.

There is nothing in this point. The defendant entered into an agreement to lease this real property. This agreement contained an important stipulation which it refused to fulfill. The plaintiffs were not compelled to take such portion of the build-

ing as the defendant might be willing to let to them, and sue for damages for refusal to include the remainder of the building in the lease. Besides, we cannot say for what sign purposes the plaintiffs wished to use the roof. It may have been that they desired to use it for the advertising of the business which they were to conduct in the portion of the building which they were to occupy, and as such they might have considered it a vital part of their leasehold.

The judgment and order refusing a new trial in the case under consideration are affirmed.

The case of Osborn against the same defendant rests mainly upon the same facts as that of Long and Wobber.

Osborn is the assignee of Newell-Murdoch Company, who as real estate brokers brought Long and Wobber and the defendant together in this transaction. Simultaneously with the execution of the agreement of the defendant to lease the property to Long and Wobber defendant entered into an agreement with Newell-Murdoch Company, by which it agreed to pay these brokers the sum of three thousand five hundred dollars upon the execution of a lease satisfactory to the defendant of the building involved in the agreement with Long and Wobber. Having broken its agreement to enter into a lease in accordance with the terms of its contract, the defendant may not now be heard to say in an action by the real estate brokers for their commission either that Long and Wobber were not able to perform their contract, or that a satisfactory lease was not executed in the premises, because a satisfactory lease would have been executed had not the defendant refused to carry out its obligation to execute it, and it was because of the fault of the defendant alone that such lease was not entered into. We have already seen that it was not the duty of Long and Wobber to furnish their sureties so long as the defendant was unwilling to carry out its agreement. (*Phelan v. Gardner*, 43 Cal. 311.)

The judgment and order are also affirmed in this case.

Kerrigan, J., and Zook, J., *pro tem.*, concurred.

A petition to have the causes heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 24, 1918.

[Civ. No. 2314. First Appellate District.—April 26, 1918.]

ACHILLE ALLOGGI, Administrator, etc., Respondent, v.  
SOUTHERN PACIFIC COMPANY (a Corporation), et  
al., Appellants.

**NEGLIGENCE—ACTION FOR DEATH—COLLISION BETWEEN AUTOMOBILE AND RAILROAD TRAIN AT CROSSING—EVIDENCE—ABSENCE OF GATES OR BARRIERS—FAILURE TO OBJECT—APPEAL—MATTER NOT REVIEWABLE.** In an action for the death of a passenger in an automobile which collided with a train of flat cars of a railroad company at a crossing over a spur-track, an assignment of error that the absence of gates or barriers at the crossing where the collision occurred was not evidence of negligence because the company was not the owner of the spur-track, and consequently there was no duty imposed upon it to maintain such barriers, will not be considered on appeal, where no objection was interposed at the trial to such evidence.

**ID.—INSTRUCTION—PRESUMPTION.**—In such an action, where the jury was instructed that if they found that the track did not belong to the defendant, the defendant was not responsible for the failure to maintain gates, barriers, or flagmen at the crossing, it will be presumed that the jury followed the instruction.

**ID.—SHUNTING OF CARS OVER CROSSING WITHOUT WARNING—FAMILIARITY WITH CROSSING IMMATERIAL.**—In such an action, where the evidence was susceptible of the construction that the defendant was guilty of negligence in shunting cars over a crossing used by the public, at night, without lights or attendants upon the cars, and without warning, the familiarity of the driver of the automobile with the crossing and his knowledge of its dangerous character, while a factor to be considered in connection with the question of contributory negligence, was in and of itself of no consequence in the determination of the company's negligence in the first instance.

**ID.—FAILURE TO STOP AT CERTAIN POINT—EVIDENCE—LACK OF CONTRIBUTORY NEGLIGENCE.**—In such an action, the driver of the automobile was not guilty of contributory negligence as a matter of law in attempting to cross without first stopping at a point where he would have had a clear view of approaching danger, where by the evidence it did not appear that by looking and listening he could have seen the cars.

**ID.—DUTY TO STOP AND LISTEN AT MOST ADVANTAGEOUS PLACE—INSTRUCTION PROPERLY REFUSED.**—In such an action, it was not error to refuse to instruct the jury that it was the duty of the driver of the automobile to stop, look, and listen at the most advantageous place, since all that was required of him was ordinary care.

**ID.—FAILURE TO CALL WITNESSES—PRESUMPTION—INSTRUCTION.**—In such an action, an instruction to the effect that if the defendant failed to call and examine as witnesses the employees whose fault caused or contributed to the accident, such failure created a presumption that the testimony of such witnesses would be unfavorable to the defendant was properly given, they being in court during the trial.

**ID.—FAILURE TO ANTICIPATE NEGLIGENCE—INSTRUCTION.**—In such an action, an instruction that one is not chargeable with contributory negligence in failing to anticipate the negligence of another, since everyone has the right to presume that others will act in a lawful manner, is erroneous, but harmless, where other instructions were correctly given on the law of contributory negligence.

**APPEAL** from a judgment of the Superior Court of Santa Clara County. J. R. Welch, Judge.

The facts are stated in the opinion of the court.

Louis Oneal, Chas. J. Heggerty, and James P. Sex, for Appellants.

Bert Schlesinger, and Fry & Jenkins, for Respondent.

**LENNON, P. J.**—At about 10 o'clock in the evening of September 19, 1913, the plaintiff, Achille Alleggi, and his wife, Leonie Alleggi, while riding in their automobile along San Salvador Street, in the county of Santa Clara, attempted to cross a spur-track leading from the right of way of the Southern Pacific Railroad Company into the yards of the Peninsular Railway Company, and in so doing the automobile which the plaintiff was driving came into collision with one of a train of several flat cars that was being switched by the defendant, the Southern Pacific Railroad Company, across San Salvador Street and into the yards of the Peninsular Railway Company. The collision resulted in the death of the wife of the plaintiff. Plaintiff thereafter sued and recovered a judgment for the sum of ten thousand dollars against defendants. From this judgment and from the order denying a new trial, the defendants appeal.

It is contended that the evidence adduced upon the whole case does not suffice to support the finding of the jury, implied from the verdict that the defendant, the Southern Pacific Railroad Company, was guilty of negligence which approximately

caused the collision. The first point urged in this behalf is that the absence of gates or barriers at the crossing where the collision occurred was not evidence of negligence, because the defendant company was not the owner of the spur-track upon which its cars were being switched and consequently there was no duty imposed upon the defendant company to maintain barriers at this particular crossing. If this point as made was intended to be an assignment of error, the answer to it is that no objection was interposed at the trial to this particular evidence, and moreover the fact that there were no barriers or gates at the crossing where the collision occurred was eliminated from the case and taken from the consideration of the jury by the trial court's instruction (given at the request of the corporation defendant) that if the jury found from the evidence that the spur-track did not belong to the Southern Pacific Company, but was the property of the Peninsular Railway Company, then the Southern Pacific Company could not be held responsible for the failure to maintain gates, barriers, or flagmen at said crossing. The undisputed evidence showed that the Peninsular Railway Company owned the spur-track, and presumably the jury followed the instruction of the court and disregarded the fact of the absence of gates, barriers, etc., at the crossing in question.

It is contended that there was no evidence showing, or tending to show, the absence of bells, signals, or other warning of the approach of the train at the time of and at the point where the collision occurred, and that, even if such evidence existed, the absence of such signals could in no wise have contributed to the accident because of the fact that plaintiff knew of the existence, character, and condition of the crossing. The evidence showed that the spur-track was being used by the defendant corporation in switching its cars; that the crossing in question, which was used by the general public, was very dangerous on account of a sharp curve which obstructed the view and also because of lumber piles on the west side of the track, which, according to the testimony of one witness, were twelve feet high along the roadway and extended along the track two hundred feet or more. Shortly prior to the collision, three flat cars were standing near the crossing. No engine was then attached to these cars. The character of the crossing and the use made of it at the time of the accident are best shown by the testimony of the defendant Foster, the engineer of the de-

endant company, who, as a witness for the plaintiff, testified: "I had been employed in the capacity of engineer since July 27, 1913. On that night I was doing general switching and was so engaged about 9:30 or 10 o'clock that evening. . . . I was switching on this spur-track. Immediately prior to that we were coming in to pick up three cars on the spur-track. I couldn't say how close we come to these flat cars here, I couldn't see them. My engine was along in here. [Indicating point 'B' on the map on the sharp curve.] There was four flat cars connected with my engine. As I attempted to make the switch I was looking across to get my signal; I got an 'easy sign' from Foreman Volkers. I was working on signals. I knew I was going in there and get some cars. I knew there were some cars on that spur-track with which I was supposed to connect and in making that switch it was the intention to connect with, and couple up, these cars. Foreman Volkers gave me the signal to take the switch. He is the engine foreman. . . . After receiving his signal I came in. I got an 'easy come ahead sign,' and then Foreman Volkers was standing away out and gave me an 'easy come ahead sign' with his lantern. I was just creeping along and I felt I was striking something. Then the foreman gave me a stop sign and I stopped. I waited for a few minutes and then he gave me another 'come ahead sign,' and I put my hand on the throttle and put the steam in the cylinder and just before we started to move again he gave me an 'emergency stop sign,' to stop before the engine had got started. He came back to me and said: 'We hit an automobile down at the crossing, and we killed a woman and the wheel of the car is right on the woman's body.' . . . Just before the accident I was coming forward around a sharp curve. I did not see Mr. Bunkers at that time. He was supposed to be working at the end of the train. I didn't see him at that time. . . . I couldn't see Mr. Bunkers because I was working on the curve at the throttle of my engine. The curve was too sharp to enable me to see him. I had headlights on the engine, both ends, and I was connected with the rear end of those four flat cars. . . . I was new on that job at that time and I hadn't noticed the pile of lumber along this track before the accident. After the accident I noticed the lumber pile. The lumber was piled up some considerable distance along the track. I could not and did not see Mr. Bunkers at the time

of the accident and do not know just where he was. I do not know whether the brakes were set on those flat cars."

The fact that the brakes were not set on the flat cars at the time of the accident is fairly deducible from this and other evidence, and it elsewhere in the evidence affirmatively appears that there was no flagman at the crossing and that there were no brakemen on any of the three flat cars which were being shunted across the track. On the other hand, the evidence is conflicting as to whether a bell was rung, how far the lumber piles extended down between the road and spur-track, whether the cars were standing still or moving, whether or not they had lights on them, and whether or not the moon was sufficiently bright to have shown the position of the cars and revealed the fact of whether they were standing still or moving at, and prior to, the time of the collision. The evidence was, therefore, susceptible of the construction, as the jury evidently found, that the defendants were guilty of negligence in shunting cars over a crossing used by the public, at night, without lights or attendants upon them, and without warning. The familiarity of the plaintiff with the crossing and his knowledge of its dangerous character was a factor to be considered in connection with the question of his contributory negligence, but, in and of itself, it is of no consequence in the determination of the question of the defendant company's negligence in the first instance.

The plaintiff testified that his wife called his attention to the fact that he was approaching the track; that in response he "kicked off the brake" of his automobile, at which time he was about seventy-five or one hundred feet from the track; that he continued toward the track slowly for a distance of about twenty feet, when he stopped his machine; that he looked up and down the track but could see nothing, "the light being so uncertain"; that his wife said, "There is nothing doing here. Go ahead."

He further testified that if he had driven up closer he could have looked farther down the track, and because of this fact it is insisted that this case falls within, and must be governed by, the rule that if the admitted physical facts establish that there was a point where, by looking and listening, plaintiff must have seen the descent of the cars upon him, he was, as a matter of law, guilty of contributory negligence in attempting to cross the tracks of the defendant company without first stopping at

a point where he would have had a clear view of approaching danger. This contention is answered, we think, by a reference to the state of the evidence upon this phase of the case, as to just what was the situation with reference to the physical facts. If the flat cars were disconnected, with no lights upon them and the moonlight was not sufficiently bright to reveal them, then it cannot be said that, by looking and listening, plaintiff must have seen them. And if, as there is some evidence to show, the cars were standing still and disconnected, assuming that there was sufficient light to have seen them, it does not follow that the plaintiff should be required to conjecture or surmise that the cars might suddenly be shunted backward without notice. (*Robinson v. Western Pacific R. R. Co.*, 48 Cal. 409; *White v. Southern Pac. Co.*, 122 Cal. 305, [54 Pac. 956]; *Chicago Co. v. Sharp*, 63 Fed. 532, [11 C. C. A. 337]; *Fort Smith etc. Co. v. Pence*, 122 Ark. 611, [182 S. W. 568].)

The court did not err in refusing to instruct the jury that it was the duty of the plaintiff to stop, look, and listen at the most advantageous place. He was not required to look at the most advantageous place, for this would be putting upon him the burden of not only knowing the most advantageous point, but also of exercising the highest degree of care, while all that was required of him was ordinary care.

Objection is taken to the court's instruction to the jury to the effect that if the defendant company failed to call and examine as witnesses the employees whose fault caused or contributed to the accident, such failure created a presumption that the testimony of such witnesses would be unfavorable to the corporation defendant. The evidence showed, without dispute, that two of the employees of defendant, Bunkers and Volkens, were charged with the duty of switching; that they were the brakemen in charge of the train; that Volkens was the engine foreman who gave the signal to the engineer to take the switch; that Bunkers' place of duty was at the end of the train, but as previously noted, Foster, the engineer, testified that, although Bunkers was supposed to be at the end of the train when the signal was given, he (Foster) did not know that such was the fact. The character of the train, the condition of the tracks, and the lights, and the location and doings of the various trainmen were peculiarly within the knowledge of Volkens and Bunkers, and, although not called as witnesses, it was stipulated that they were present in court during the



trial of the case. The plaintiff established a *prima facie* case. The defendant offered very little testimony, practically submitting its case on the showing made by plaintiff. This case, therefore, falls within the well-settled rule that "when the evidence tends to prove a material fact which imposes a liability on a party, and he has it in his power to produce evidence which from its very nature must overthrow the case made against him if it is not founded on fact, and he refuses to produce such evidence, the presumption arises that the evidence, if produced, would operate to his prejudice, and support the case of his adversary." (*Bone v. Hayes*, 154 Cal. 765, [99 Pac. 175]; Code Civ. Proc., sec. 2061, subd. 7.)

The court gave, at plaintiff's request, an instruction (No. 17), which, among other things, declared that "one is not chargeable with contributory negligence in failing to anticipate the negligence of another, and in not providing against it. Every one has a right to presume that others will act in a lawful and proper manner; consequently the law will not hold it imprudent in a plaintiff to act upon a presumption that the defendant has done or will do his duty." This instruction in the particular quoted, and in so far as it might have been applied to the facts of the case, was error, for "it is not the law of this state that a person approaching a railroad crossing is authorized to assume that the person operating a train will not in any way be negligent in that operation. . . . Such a rule would abrogate the doctrine of contributory negligence in all such cases." (*Hutson v. Southern California Ry. Co.*, 150 Cal. 703, [89 Pac. 1093]; *Herbert v. Southern Pac. Co.*, 121 Cal. 227, [53 Pac. 651]; *Griffin v. San Pedro etc. R. Co.*, 170 Cal. 776, [L. R. A. 1916A, 842, 151 Pac. 282].) We are satisfied, however, from a consideration of the instructions as a whole, that this general instruction did not operate to mislead the jury, for the correct rule relative to contributory negligence was, in several other instructions, stated and restated, and thereby the effect of the erroneous instruction was palliated, if not entirely negated. Thus, instruction No. 28, given at the request of the defendant, was one of several directed to the point that "One who is approaching a railroad track cannot rely upon the fact that a whistle would be blown or that a bell would be rung, or that lights would be displayed, but he must so approach the track that even though the whistle were not blown or the bell not rung or that no signals were

given, he could stop his vehicle in time to avoid danger." We are not unmindful of the rule that conflicting and contradictory instructions upon a material phase of the case require a reversal where it cannot be ascertained from the record before us which instruction prevailed, or was likely to prevail with the jury. While it is true that the instruction complained of in the present case is erroneous, and in a measure in conflict with several other instructions which correctly stated the rule of law relative to contributory negligence, nevertheless the correct rule of law was so specifically stated and restated to the jury that we feel that the idea in the several correct instructions must have preponderated in the considerations of the jury, and that as a consequence the erroneous instruction neither contributed to, nor controlled, the verdict.

Judgment affirmed.

Flood, J., *pro tem.*, and Kerrigan, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 24, 1918.

---

[Civ. No. 1810. Third Appellate District.—April 27, 1918.]

THE PEOPLE, etc., et al., Respondents, v. CITY OF LEMOORE (a Municipal Corporation), et al., Appellants.

**MUNICIPAL CORPORATIONS—ANNEXATION OF TERRITORY—INHABITED AND UNINHABITED PARCELS—PROCEDURE.**—In this proceeding to test the validity of an attempted annexation to the city of Lemoore of three hundred and eight and one-half acres of land designated as "the 1916 addition to the city of Lemoore," it is held that inasmuch as some of the parcels were inhabited and others uninhabited, the procedure laid down by the act of 1913 (Stats. 1913, p. 587) should have been followed as to the former, and the procedure laid down in the act of 1899 (Stats. 1899, p. 37) as to the latter.

APPEAL from a judgment of the Superior Court of Kings County. M. L. Short, Judge.

The facts are stated in the opinion of the court.

F. E. Kilpatrick, and J. L. C. Irwin, for Appellants.

U. S. Webb, Attorney-General, Haven & Athearn, and  
H. Scott Jacobs, for Respondents.

BURNETT, J.—The purpose of the proceeding was to test the validity of an attempted annexation to the city of Lemoore of 308½ acres of land designated as “the 1916 addition to the city of Lemoore.” A general demurrer to the complaint was overruled, and defendant declining to answer, judgment was rendered in accordance with the prayer of the complaint annulling such purported annexation. The question, therefore, is as to the sufficiency of the complaint to justify the decree.

It is not disputed that there are in force in California three separate statutes under which annexations of territory to municipalities may be made: Acts of 1889 (Stats. 1889, p. 358); of 1899 (Stats. 1899, p. 37); and of 1913 (Stats. 1913, p. 587).

The distinctive features of these acts, as far as germane to the present consideration and pointed out by respondents, are as follows:

(1) Act of 1889 for annexation of inhabited territory upon petition of electors of existing city.

(2) Act of 1899 for annexation of uninhabited territory.

(3) Act of 1913 for annexation of inhabited territory upon petition of electors in territory proposed to be annexed, which territory may be either: (a) One body (secs. 2 to 4) or (b) Two or more bodies, which must be submitted as separate propositions. (Sec. 6.)

In applying the law thus enunciated to the facts set out in the complaint these two inquiries are suggested by counsel:

1. Should the proposed annexation of the territory described in the complaint have been attempted as inhabited or uninhabited territory? 2. If the territory can “fairly be said to be inhabited,” then should it have been regarded as one body of land or as “two or more bodies of outside territory,” each one of which should have been submitted to the electors separately under the provisions of section 6 of the act of 1913?

It seems plain that the first of these questions cannot be answered so as to support the judgment of the court below.

If the 308½ acres be regarded as one tract, it must be considered as inhabited, for the simple reason that ninety-nine people reside upon it.

There would be no difference in principle if the tract were composed of ten acres or of one acre. If A owns a farm of 308½ acres composed of one tract and B one of ten acres and each resides upon his land, it would be just as inapt to say that any part of A's land is uninhabited as to so affirm of B's land. The fact of occupancy is not limited, manifestly, to the space occupied by the building or buildings, but extends to every portion of the single tract of which that space is an undivided part. It may be difficult to formulate a description that can be applied with accuracy to every situation, but to say that any portion of a single and separate tract of land is uninhabited when people actually reside within the boundaries of that tract of land involves a contradiction in terms.

The real point of controversy here is whether such land was properly regarded as a single tract, and as to this we entertain no doubt that the court below was right in impliedly holding that it was composed of several parcels and under the law of 1913 should have been submitted to a separate vote.

Paragraph 9 of the complaint is as follows:

"The territory attempted to be annexed by the proceedings hereinabove set forth and designated as 'The 1916 addition to the city of Lemoore' is platted on a map hereunto annexed and marked 'Exhibit A' and by this reference made a part hereof. Said territory is not a single body of territory lying contiguous to the City of Lemoore, but in fact, by reason of natural boundaries and diversity of uses is constituted and composed of nine separate and distinct parcels of land, which said parcels of land are described as follows, to wit: Parcel No. 1, contains approximately forty-eight (48) acres, is contiguous to said city of Lemoore and adjoins portions of the southerly and easterly corporate limits of said city. Said parcel is, however, wholly disconnected with any of the other property proposed to be annexed to said city of Lemoore, except that it is connected with parcel No. 2, hereinafter described, by a strip of land 1650 feet in length by 20 feet in width, and which strip of land is part of a public county road. This parcel constitutes a portion of a farm belonging to the relator, J. H. Fox, and is and was at all times herein mentioned entirely used for farming purposes. Said parcel is and at all times herein

mentioned was entirely uninhabited and no person resided or now resides thereon."

Parcel No. 2 is described as containing twenty-three acres and bounded on the north and east by the corporate limits and on the south and west by county roads, and it is alleged that, while subdivided for residential purposes, no person resides upon it.

Parcel No. 3 contains thirty acres, is separated from parcel No. 2 and parcels Nos. 4 and 5 by county roads, and is contiguous to the corporate limits only at the northeast corner of said parcel. It constitutes a part of a farm and has one dwelling-house upon it occupied by three persons.

Parcel No. 4 contains thirteen and one-half acres. It has been subdivided for residence purposes and is inhabited by forty persons.

Parcel No. 5 contains eighteen acres, separated from the corporate limits by parcel No. 4. It has been subdivided for residence purposes and is known as the Sunset Addition. No person resides upon any portion of it nor have any streets been constructed therein.

Parcel No. 6 contains twenty-nine and one-half acres and is contiguous to the northern part of the western corporate limits, but is separated from parcels Nos. 4 and 5 by the right of way of the Southern Pacific Railroad Company and from parcel No. 7 by a county road. It is used for farming purposes and is entirely uninhabited.

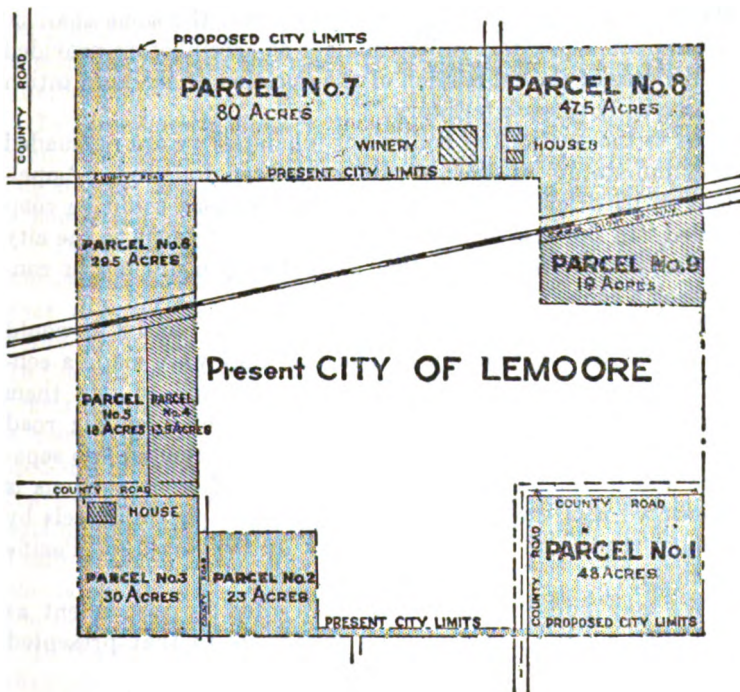
Parcel No. 7 contains eighty acres, is contiguous to the northern limits of the city, and is separated from parcels Nos. 6 and 7 by county roads. Said parcel, with the exception of four acres in the southeast corner thereof, is a portion of a ranch belonging to the relator, Lemoore Land and Fruit Growing Company, and used for farm purposes. "Said parcel, with the exception of said four acres, is, and at all times" herein mentioned was, totally uninhabited and no person resided or now resides thereon. The excepted parcel of four acres above referred to contained a winery at the time of said annexation. Said winery was occupied by five persons, a night watchman, his wife, and two children, and an engineer. They were all transient and none of them a voter.

Parcel No. 8 contains forty-seven and one-half acres and is separated from parcel No. 7 by a county road and from parcel No. 9 by a right of way of the Southern Pacific Company.

It is composed of portions of three ranches. There are two dwellings on the southwest corner of said parcel occupied by six persons, who are not voters.

Parcel No. 9 contains nineteen acres and is separated from parcel No. 8 by a right of way of the Southern Pacific Company. This parcel has been subdivided for residence purposes and is occupied by forty-five persons.

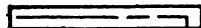
We herewith present a copy of said exhibit "A," which portrays the situation as thus described in the complaint.



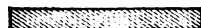
Map Showing Territory Attempted to be Annexed to City of Lemoore.

Scale 1 inch to 800 feet.

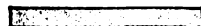
Present corporate limits, City of Lemoore



Inhabited territory attempted to be annexed



Uninhabited territory attempted to be annexed



We think it must fairly be said from the foregoing that the new territory constituted more than one body, and that some of the parcels were inhabited and others uninhabited.

As to the former, the procedure indicated by section 6 of the act of 1913 should have been taken as follows: "The notice of such election shall state as separate propositions to be submitted at such election the question of the annexation of each body of new territory in the same manner as hereinbefore provided in the case of the notice of an election in such municipal corporation at which the question of the annexation of only one body of new territory thereto is submitted; and the question as to each such body of new territory shall be printed upon the ballots to be used at such election and the same shall be voted upon separately in like manner as hereinbefore provided in the case of the submission of the question of the annexation of one body of such territory."

As to the portions or bodies not inhabited we are persuaded that the statute of 1899 should have been followed. Appellant in its brief admits that separate elections could be compelled "in the case of numerous parcels contiguous to the city but separated from each other so that they could not be considered a contiguous body."

If we confine our attention to parcels Nos. 1 and 2, it would be a strained construction to hold that they were made a continuous and contiguous body by the attempt to join them through the instrumentality of a portion of a public road twenty feet wide and 1,650 feet long. They remain two separate and distinct bodies. The continuity of other portions is prevented also, and they are divided into separate parcels by county roads and the right of way of the Southern Pacific Company.

We may notice some of the cases cited by respondent as involving a situation somewhat analogous to that presented here.

In *Wild v. People*, 227 Ill. 556, [81 N. E. 707], the proceeding was in *quo warranto* to test the validity of the incorporation of a village. The plat shows that to the original inhabited hamlet the incorporators proposed to annex several narrow strips of land running in several directions from the inhabited portion of the hamlet. Toward the southwest a long strip was run with three angles, and from the bottom of the last strip, along a section line, was run a narrow strip fifty feet in width and half a mile long which connected a square body of land with the rest of the proposed incorporation. Some of the other strips were not contiguous except

that they cornered on each other. It was held that these strips which simply cornered were not contiguous, and as to the connecting fifty-foot strip the court said: "It is apparent that the fifty-foot strip is merely included for the purpose of connecting the piece of ground at the west end thereof with other territory in the village. It is also apparent that the piece of ground at the west end of the strip is not in fact contiguous to grounds in the village other than that strip. The use of that strip to connect the tract at its western extremity with other territory in the village is a mere subterfuge and not a compliance with the law. It is useless to discuss the plea further."

In *Linn County Bank v. Hopkins*, 47 Kan. 582, [27 Am. St. Rep. 310, 28 Pac. 606], the question was whether two cornering lots of land constituted one tract so as to be included in a homestead, and the court said:

"Does the constitution exempt two tracts of land as a homestead which corner? It has been settled by the court that a homestead must consist of only one tract of land. (*Randall v. Elder*, 12 Kan. 257, and authorities there cited.) In the case of *Kresin v. Mau*, 15 Minn. 119, it was said: 'Two tracts of land mutually touching only at a common corner—a mere point—cannot, according to any ordinary, or authorized use of language be spoken of as constituting one body or tract of land.' The same construction has been placed upon acts of Congress in relation to the entry of public lands. (1 Leslie's Land Laws, Reg. and Dec. 360. See, also, *Hill v. Bacon*, 43 Ill. 477; *Aldrich v. Thurston*, 71 Ill. 324; Thompson on Homestead Exemptions, secs. 120, 145, 147.)"

In the *Bolen Coal Co. v. Ryan*, 48 Mo. App. 515, it was held that lots separated from each other by an alley were not contiguous so as to permit a single mechanic's lien to be enforced.

*Anvil H. & D. Co. v. Code*, 182 Fed. 205, [105 C. C. A. 45], involved a similar question as to assessment work on mining claims and the circuit court of appeals of the ninth circuit said: "The two claims last named are not made contiguous by the fact that Lucky Fraction corners with each. Two tracts of land which touch at a common corner are not contiguous."

Another case more directly in point is *Capuchino Land Co. v. Board of Trustees of San Bruno*, 34 Cal. App. 239, [167 Pac. 178], wherein the matter was clearly considered and cogently treated by the first district court of appeal. There is



no appreciable difference in principle between that case and this, and the reason is just as persuasive here as there for sustaining the judgment of the lower court.

Of course, it is true, as stated in *People v. City of Los Angeles*, 154 Cal. 220, [97 Pac. 311], that the "question whether any particular territory of the shape, extent, and character fixed should be annexed to a municipality is purely political for the exclusive determination of the voters of the municipality sought to be annexed and with the wisdom of such determination the courts have no power to interfere."

But, it is equally true, as therein affirmed, that the courts have the right to interfere when some substantial provision of the law has been violated, and such, we believe, is this case.

We consider it manifestly unjust and inequitable under the circumstances described by the complaint for the electors residing in the two inhabited parcels Nos. 4 and 9 to determine the annexation of the other parcels against the will of their owners.

In conclusion, we may say that possibly by answer an issue might have been tendered so that it could be shown that these various tracts were used and treated as one tract and were, therefore, properly subject to the proceeding taken, but we are satisfied that their separate character is disclosed by their location, their different use, and the different conditions as to inhabitants, as set forth in the complaint.

We think the judgment is right, and it is therefore affirmed.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 24, 1918, and the following opinion then rendered thereon:

THE COURT.—The conclusion of the district court of appeal is fully sustained by what is correctly stated as to parcel No. 1, and the remaining parcel or parcels, and in denying a hearing in this court we are not called upon to express or indicate any opinion with regard to whether the parcels other than that numbered 1 together constitute a single body of land.

Our denial of the petition for a hearing in this court is not to be taken as an assent to what is said in the opinion of the district court of appeal on this point.

[Civ. No. 2224. First Appellate District.—April 29, 1918.]

CRANE COMPANY (a Corporation), Respondent, v. MARYLAND CASUALTY COMPANY (a Corporation), Appellant.

**MECHANICS' LIENS—RECOVERY ON STATUTORY BOND—FILING OF LIEN ESSENTIAL.**—Under the mechanic's lien law, only those persons who have filed their claims of lien are entitled to recover upon the statutory bond furnished pursuant to section 1183 of the Code of Civil Procedure.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

John Ralph Wilson, and Charles B. Morris, for Appellant.

Milton Newmark, for Respondent.

A. A. Moore, Stanley Moore, and L. R. Weinmann, as *Amici Curiae*.

BEASLY, J., *pro tem.*—The defendant, Maryland Casualty Company, appeals from a judgment in favor of plaintiff upon a statutory bond furnished pursuant to section 1183 of the Code of Civil Procedure by the defendant to the owner of the building that was being erected by Siebert & Company, as contractors, and for which the plaintiff, Crane & Company, furnished materials.

The sole question in the case is whether or not it was a condition precedent to the recovery by the respondents in this action against appellants upon their bond that the respondent file a claim of lien pursuant to the provisions of the mechanic's lien law. The trial court decided this question in the negative, and in accordance with this answer gave judgment for plaintiff, although plaintiff had filed no such claim. The answer given by the trial court to the question was incorrect and the judgment must, therefore, be reversed, and it is so ordered. (*Hubbard v. Jurian*, 35 Cal. App. 757, [170 Pac. 1093].)

Lennon, P. J., and Kerrigan, J., concurred.

[Civ. No. 2317. First Appellate District.—April 29, 1918.]

**MERCHANTS COLLECTION AGENCY, (a Corporation),**  
Respondent, v. **JAMES D. ROANTREE et al.,** Appel-  
lants.

**PROMISSORY NOTE—THREAT OF CRIMINAL PROSECUTION—PUBLIC POLICY—VOID INSTRUMENT.**—A promissory note obtained by threats of criminal prosecution for embezzlement is against public policy and void.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. Thomas F. Graham, Judge.

The facts are stated in the opinion of the court.

Leon Samuels, Jos. L. Taaffe, and Chas. J. McDonnell,  
for Appellants.

E. H. Wakeman, for Respondent.

**BEASLY, J., pro tem.**—This action was brought to recover the balance due on a promissory note in the sum of \$3,950, executed by the defendants in favor of Gilmartin Company (a corporation), plaintiff's assignor, upon which the amount of \$1,125 had been paid. The defense offered by both defendants was lack of consideration for the note and duress in obtaining it. The trial court found against these defenses, and awarded plaintiff judgment as prayed. This appeal is from the judgment and an order denying defendants' motion for a new trial.

James Roantree was employed before the San Francisco fire of April 18, 1906, as bookkeeper for the Gilmartin Company, a printing concern, and received for his services \$125 a month. The printing establishment was totally destroyed in that fire, and in the month of July thereafter the company undertook to re-establish its business. Roantree was re-employed, and acted in the various capacities of bookkeeper, salesman, solicitor, assistant manager, and at times sole manager, and as such devoted more time and was burdened with more arduous and responsible duties than formerly. No salary was formally fixed for him by the officers of the company, but he drew from time to time during each month as he needed

it sums which at the end of four and one-half years aggregated an amount which would represent payments to him of \$290 a month. These sums so received by Roantree were drawn openly and were all duly entered upon the books of the concern, either by himself or an assistant bookkeeper. In December, 1910, Roantree, having accepted a position with another printing establishment, gave notice of his intended resignation from the Gilmartin Company, and asked the president, James Gilmartin, for an adjustment of certain money invested by him in the company. Gilmartin then charged Roantree with having drawn from the funds of the company some five thousand dollars more than he was entitled to, and demanded restitution thereof. Roantree denied that he owed anything, claiming that all moneys drawn by him were in payment of salary. The matter was placed in the hands of the company's attorney, and a demand made upon Roantree for the sum of four thousand one hundred dollars, this amount being arrived at as a balance claimed to be due from Roantree for money drawn as above stated after crediting him with \$150 a month as salary for the first six months after his re-employment, and two hundred dollars a month for the remainder of the period down to December, 1910.

The evidence showed that the attorney for Gilmartin Company threatened that the company would have Roantree arrested for embezzlement if he did not pay the sum which they claimed Roantree had overdrawn his salary. In their answer the defendants alleged that Roantree was not indebted to the Gilmartin Company in any sum of money whatsoever; and that the execution of the note was obtained by duress, in that the Gilmartin Company threatened to institute criminal proceedings against Roantree unless himself and his wife executed the note, and that by reason of these threats and to avoid the threatened criminal proceedings they did execute it. The court found against defendants on these issues of their answer. The only real question here is whether the finding of the court that the note was not executed because of these threats is sustained by the evidence.

Mrs. Roantree testified that she signed the note only because of the threats. Roantree's testimony as to the reason for his signing the note was the same. That the attorney for the Gilmartin Company had threatened Roantree with criminal proceedings unless he signed the note is admitted by him.

The facts of this case bring it fairly within the rule declared in the case of *Morrill v. Nightingale*, 93 Cal. 452, [27 Am. St. Rep. 207, 28 Pac. 1068], where it is said: "The consent of a party to a contract must be free, and it is not free when obtained through duress or menace. Section 1569 of the Civil Code declares duress to consist in the 'unlawful confinement of the person of the party' or 'of the husband or wife of such party,' etc., or 'the confinement of such person, lawful in form, but fraudulently obtained.' Section 1570 provides, menace consists in a threat of the duress above specified, or of a threat of injury to the character of such person. In this case there was no arrest and confinement, hence no duress; but the history of the transaction as disclosed by the findings clearly indicates threats of imprisonment upon a charge of embezzlement, which in effect necessarily were threats of injury to the character of defendant Nightingale, and consequently a menace." The doctrine of the case just quoted has been very recently reiterated and affirmed by the supreme court in the case of *People v. Beggs*, 178 Cal. 79, [172 Pac. 152], in support of the declaration that "the law does not contemplate the use of criminal purposes as a means of collecting a debt. To invoke such process for the purpose named is, as held by all authorities, contrary to public policy," and by way of emphasis the supreme court in the case of *Beggs* supposes a situation, based upon circumstances which are not materially different from the facts in the instant case, thus: "If instead of paying the two thousand dollars, Da Rosa (the complaining witness in the *Beggs* case), under the circumstances shown to exist, had given his note and a mortgage securing the same, then under the authority of the case cited (*Morrill v. Nightingale*, *supra*), payment thereof could not have been enforced, the reason therefor being that the execution of the security was procured by the wrongful use of fear, induced by the threat to prosecute him for the crime out of which the indebtedness arose." Upon the authority of that case it is clear that the execution of the note in suit was obtained from the defendant by means of menace and therefore no recovery should be had thereon.

Pursuant to the reason and authority of these cases it must be held that the finding of the court, above referred to, to the effect that this note was not obtained by the threats of crim-

inal prosecution was not sustained by the evidence, and as the finding was vital to the judgment, the case must be reversed, and it is so ordered.

Lennon, P. J., and Kerrigan, J., concurred.

---

[Civ. No. 1842. Third Appellate District.—April 29, 1918.]

**J. R. CATLETT, Respondent, v. F. H. BENNETT et al., Appellants.**

**NEGLIGENCE—BREAKING OF LEVEE—FLOODING OF LAND—DEFECTIVE CONSTRUCTION OF CANAL—INFERENCE FROM EVIDENCE.**—In this action for damages to crops caused by the flooding of plaintiff's land, due to the breaking of the levee of a reclamation district, it is held that it is not an unreasonable inference that the levee would not have given away if the additional water had not been projected against it by reason of the negligence of the reclamation district trustees in the construction of the canal.

**ID.—MEASURE OF DAMAGE TO CROPS.**—In such an action, the measure of plaintiff's damages is to be determined by finding the value of the probable yield and the market value of the crop had it not been damaged, less the cost of producing and marketing the crop.

**APPEAL** from a judgment of the Superior Court of Sutter County. K. S. Mahon, Judge.

The facts are stated in the opinion of the court.

W. H. Carlin, for Appellants.

M. E. Sanborn, and Laurence Schilling, for Respondent.

**BURNETT, J.**—The action was for damages to crops caused by the flooding of plaintiff's land in January, 1914. The gist of the complaint is shown by these allegations:

“That defendants did, during the early part of the year 1913 excavate and cut a canal and build a levee [describing it]; that said canal and said levee cut through a high ridge running in an easterly and westerly direction; that said high ridge had always heretofore protected the lands and crops of

plaintiff from the overflow waters of Pleasant Grove Creek and from the flow of waters on the Southeasterly side of said high ridge; that plaintiff is informed and believes and upon such information and belief, states that said canal and levee was a part of a scheme of the defendants to build a system of levees and canals for the purpose of constructing a by-pass between Reclamation District 1000 and Reclamation District 1001 for carrying off the drainage and overflow waters of the adjacent country and the overflow from Pleasant Grove Creek." (It may be stated here that defendants were and are the trustees of said Reclamation District No. 1000.)

"That when defendants had excavated said canal and built said levee between the points aforesaid they ceased and abandoned their work on their said scheme to construct the by-pass and did not complete their plan and failed to complete the canal and levee in question or to build other canals or levees to take care of the overflow waters of Pleasant Grove Creek and the country lying on the southeast side of said high ridge; that the canal so constructed by defendants was constructed with a pitch that caused the waters from the overflow of Pleasant Grove Creek and the waters from the country on the southeast side of said high ridge to flow directly towards and against the lands and levees of plaintiff in addition to the waters that usually flowed against said levees; and that the levee so built by defendants helped to divert and cause to flow into said canal as aforesaid the overflow waters from Pleasant Grove Creek and the waters from country on the southeast side of said high ridge; that defendants left said canal and levee incomplete, and said canal open and unobstructed; that by reason of the foregoing acts of defendants the overflow waters from Pleasant Grove Creek and the waters from the vicinity lying Southeast of said high ridge did, on or about the 1st day of January, 1914, flow through the said canal and against the levee surrounding the land of plaintiff and augmented the water ordinarily flowing against said levees to such an extent that said levees were broken down and destroyed; that if said canal had never been excavated, or said levee never been built, or if said scheme of defendants had been completed said overflow waters from Pleasant Grove Creek and from the vicinity lying northeast of said high ridge would never have been added to the waters ordinarily flowing

against the levees surrounding plaintiff's lands and caused them to break down to his damage as aforesaid."

Appellants in their brief contend for three propositions: "1. The evidence is insufficient to prove that the damage to plaintiff's crop was caused by any of the acts of defendants or for that matter from any waters coming thereto from the south of plaintiff's land; that is to say, from the direction of Reclamation District 1000. 2. There is no evidence to prove any loss of plaintiff in connection with his levees. 3. Errors of law committed by the lower court in adopting what we claim to have been an incorrect method of computation."

Of these contentions the only one concerning which there can be any serious controversy is the first one. As to this, from a reading of the entire record, the conviction arises that the evidence is not very persuasive. However, we think it cannot be said that the finding adverse to appellants is entirely unsupported. The only particular omission urged by appellants is, that the evidence does not show that the levee protecting plaintiff's land was broken by the waters flowing from the south in the canal constructed by the defendants.

As to the construction of the canal itself by defendants, its condition as described in the complaint, and the fact that it caused a large volume of flood water to be thrown against the land of plaintiff, there is no serious controversy, and these considerations need receive no further attention. The other point is not so clear by reason of the fact that quite a volume of flood water was precipitated against plaintiff's said levee through a water-way called King Creek coming from the north, with which, admittedly, appellants had no connection. As to this appellants claim: "There is no dispute whatever in the testimony that the waters of King Creek alone would have done all the damage claimed to have been suffered by plaintiff; and while there is some evidence to the effect that where these breaks occurred certain waters from the south and east passed through these breaks commingling with the waters of King Creek, yet we claim that the damage had been done independent of any action of these waters, and that even as to those a large portion came from the east and only a relatively small portion of the waters from the south ever reached either of these breaks. We claim there is no evidence in the record which tends to show by anything which may be called substantive proof that these breaks were not caused solely by the



action of the waters of King Creek, and then after these breaks had thus been caused, the amount of contribution to any possible damage by waters which reached plaintiff's land from and through this intercepting canal to the south was so insignificant as not to amount to a material contributory cause."

In reference to this contention, however, it may be said that if the levee had held, no damage would have been done to the land. This appears clear enough from the testimony. We think, also, that it is not an unreasonable inference that the levee would not have given way if the additional water had not been projected against it by reason of the negligence of appellants in constructing said incomplete canal. This is not a matter capable of demonstration. It rests somewhat on opinion based upon a consideration of the surrounding circumstances. There was no attempt at a technical exposition of the strength of said levee or of the pressure upon it caused by the waters coming from the north or from the south, but witnesses testified substantially that it had before withstood the impact of a larger volume of water from said King Creek, and that when the break occurred more water was being thrown against it through the said canal constructed by defendants than through said creek, and, hence, we may say it was not an unreasonable deduction drawn by the trial judge "that the negligence of defendants was a proximate contributory cause of the injury." If the negligence of defendants contributed to the breaking of the levee, then, manifestly, it would be unimportant what part of the water that overflowed the land came from said King Creek and what part from the canal. However, as to this there is testimony that the larger part came from the canal.

Of the \$832.15 awarded as damages, the court allowed the sum of one hundred dollars for the destruction of the levee.

There is direct testimony that it would cost that amount to repair it, and, therefore, it cannot be said that the finding in that particular is unsupported.

The third objection of appellants is based upon the fact that the court in determining the damage to the crops adopted the rule of ascertaining the probable yield and market value of the crop had it not been damaged, deducting therefrom the cost of producing and marketing the same. It is admitted by appellants that the course was sanctioned by the supreme court in *Teller v. Bay & River Dredging Co.*, 151 Cal. 209, [12 Ann.

Cas. 779, 12 L. R. A. (N. S.) 267, 90 Pac. 942], and by this court in *Dennis v. Crocker-Huffman etc. Co.*, 6 Cal. App. 58, [91 Pac. 425]. They claim, however, that the rule is not correct and think those cases should be overruled. We are, however, entirely satisfied with those decisions and desire to add nothing to the consideration therein advanced.

Under the familiar rule as to the province of appellate courts, we think the judgment should be affirmed, and it is so ordered.

Chipman, P. J., and Hart, J., concurred.

---

[Civ. No. 1849. Third Appellate District.—April 29, 1918.]

RUBIN FEST, Petitioner, v. SUPERIOR COURT OF  
SONOMA COUNTY et al., Respondents.

**JUSTICE'S COURT APPEAL—JUSTIFICATION OF SURETIES ON UNDERTAKING—WAIVER.**—Where an undertaking on appeal from a justice's court was filed which was on its face in due form and duly executed and notice thereof served, and plaintiff demanded that the sureties justify, but before day of justification stipulated that defendant might justify at a time unauthorized by section 978a of the Code of Civil Procedure, the superior court should have treated the stipulation as a waiver of justification and have entertained the appeal on the assumption that a sufficient undertaking had been filed.

**ID.—REVIEW OF ACTION OF SUPERIOR COURT—MANDAMUS.**—*Mandamus* is available as one of the means of determining whether the superior court was justified in dismissing an appeal from a justice's court for failure of the sureties on the undertaking to justify as provided by section 978a of the Code of Civil Procedure.

**APPLICATION for a Writ of Mandamus** originally made to the District Court of Appeal for the Third Appellate District to compel the Superior Court to proceed with the trial of a Justice's Court appeal.

The facts are stated in the opinion of the court.

W. F. Cowan, for Petitioner.

C. C. Cowgill, for Respondents.

CHIPMAN, P. J.—*Mandamus*. Alleging the official capacity of defendants, the petition sets forth the following facts: That on December 24, 1917, in the said justice's court of Sonoma Township, Sonoma County, a judgment was made and entered in an action wherein J. H. Murray was plaintiff and Rubin Fest, petitioner herein, was defendant, in favor of said plaintiff Murray and against petitioner herein for the sum of \$86, claimed by said Murray to be due him as costs in an action pending wherein he was performing the duties of constable; that on January 18, 1918, petitioner duly filed and served notice of appeal, together with a sufficient undertaking on appeal, and did duly perfect an appeal from said judgment to the superior court of said county; that on January 21, 1918, said judgment creditor served notice upon petitioner that the sureties on said bond would be required to justify before said justice, and immediately thereupon petitioner notified said judgment creditor that said sureties would justify before said justice, within five days after the receipt of said notice requiring justification, to wit, on the twenty-sixth day of January, 1918, at the hour of 11 o'clock A. M.; that on January 22, 1918, and after service of notice requiring justification, C. C. Cowgill, Esq., attorney for said Murray in said action, "wrote to W. F. Cowan, attorney for petitioner, stating that he would be engaged in the trial of an action in San Francisco on the twenty-fifth day of January, 1918, and thereafter in a communication over the telephone, owing to the uncertainty of whether Mr. Cowgill would return to Sonoma on the twenty-sixth day of January, 1918, to attend said justification, Mr. Cowgill thereupon consented that said justification might be continued until January 30, 1918, and pursuant thereto, said Mr. Cowgill on the twenty-sixth day of January, 1918, caused to be filed in said justice's court a stipulation extending the time for said justification to January 30, 1918, at 11 o'clock A. M. That pursuant to the provisions of section 978a of the Code of Civil Procedure of the state of California, justification by the sureties on such an appeal bond is required to be made within five days after the service of notice requiring such justification, and this petitioner and said sureties, had not said stipulation been made, were ready, able, and willing to justify within the five days required, to wit, on January 26, 1918, at 11 o'clock A. M., in said court pursuant to the notice theretofore given to that effect, and would have so justified had not

said stipulation been signed, and this petitioner alleges that by reason of the signing of said stipulation and the filing thereof by said judgment creditor, his right to require a justification of said sureties within said five days was waived"; that petitioner did not justify at the time specified in said stipulation because said court would have no jurisdiction to entertain said matter after a period of five days had expired, "but petitioner, however, did in good faith and in an attempt to comply with said stipulation file a bond on appeal executed by a reliable and solvent surety company"; (this bond was filed January 28, 1918); that on or about February 11, 1918, said Murray moved the said superior court for an order dismissing said appeal "on the ground solely that the sureties on the original undertaking on appeal in said action had not justified within five days or within the time reequred by section 978a of the Code of Civil Procedure," and thereafter said Thos. C. Denny, judge of said superior court, made an order dismissing said appeal; that said court and said judge "do now refuse to proceed with the hearing of said trial or to hear or determine the same upon its merits."

There are averments in the petition to the effect that said justice of the peace threatens to issue execution on said judgment and cause the same to be levied on the property of petitioner. But the writ was not served upon said justice of the peace and he has not answered or appeared.

Respondent, Judge Denny, appeared and moved to strike out the averments of the petition relating to the filing of said stipulation on the ground that they are evidentiary and not ultimate facts. He also interposed a demurrer on the grounds: 1. That there is a misjoinder of parties; 2. That several causes of action have been improperly united; 3. That the petition is ambiguous; 4. That the petition does not state facts sufficient to constitute a cause of action.

In his answer, respondent Denny admits most of the averments of facts. As to the alleged stipulation, "alleges that C. C. Cowgill, attorney for plaintiff, at the request of W. F. Cowan, attorney for defendant, and not otherwise, signed said stipulation; but denies that by reason of said stipulation or otherwise or at all, plaintiff waived the justification of the sureties on said undertaking." On information and belief, denies the averments of the petition that said sureties were ready, able, and willing to justify as alleged in the petition,

and denied that they would have appeared and justified but for said stipulation; alleges "that on the twenty-seventh day of February, 1918, defendant Honorable Thos. C. Denny, as judge of said superior court, duly made an order dismissing defendant's appeal to said superior court in the case of *J. B. Murray v. Rubin Fest*, and said order has not been modified, set aside, or repealed, but remains in full force and effect."

The matters sought by the motion to be stricken from the petition were the averments of facts on account of which the waiver mentioned in the petition is claimed. While some of the alleged facts may be evidentiary, we think it was proper to state such as might in petitioner's view constitute a waiver.

The misjoinder of parties alleged as ground of demurrer need not be considered. The justice of the peace named as a defendant was not served with the writ and has not appeared. The matter may properly be heard as concerning only the superior court and the judge thereof. We think *mandamus* was available to petitioner as one of the means by which the question may be determined. (*Clay v. Superior Court*, 32 Cal. App. 190, [162 Pac. 416].)

The points urged by respondent, in support of his general demurrer, are so closely related to his argument upon the merits that we think it best to dispose of the case on its merits as disclosed by the facts.

Did the stipulation to fix the date on which to justify on the bond have the effect to waive justification? The stipulation signed by the attorney of plaintiff in the action reads as follows: "It is hereby stipulated and agreed, that the defendant and appellant herein may have until and including January 30, 1916, in which to justify on the bond on appeal given herein." Section 978a of the Code of Civil Procedure provides that "the undertaking on appeal must be filed within five days after the filing of the notice of appeal and notice of the filing of the undertaking must be given to the respondent." Admittedly this was done. The section also provides that "the adverse party may except to the sufficiency of the sureties within five days after the filing of the undertaking, and unless they or other sureties justify before the justice or judge within five days thereafter, upon notice to the adverse party, to the amounts stated in their affidavits, the appeal must be regarded as if no such undertaking had been given."

It has been held that justification of the sureties must be made within five days after notice served, otherwise the superior court has no jurisdiction to entertain the appeal. (*Crowley v. Superior Court*, 10 Cal. App. 342, [101 Pac. 935]; *Coker v. Superior Court*, 58 Cal. 177.) It has also been held that the party excepting to the sufficiency of the sureties may waive his objection but the waiver must be made within the five days required for the justification. (*Crowley v. Superior Court*, *supra*; *Budd v. Superior Court*, 14 Cal. App. 256, [111 Pac. 628]; *Fletcher Collection Agency v. Superior Court*, 31 Cal. App. 193, [159 Pac. 1049]; *Clay v. Superior Court*, 32 Cal. App. 189, [162 Pac. 416].) As we understand the *Crowley* and *Budd* cases, the justification must be made within five days after notice of exception to the sureties on appeal bond has been filed in the justice's court, but not within five days after notice of appeal and filing of the undertaking. In the present case, the notice excepting to sureties was filed December 21, 1916. December 26, 1916, was, therefore, the last day on which the sureties could justify. Justification was not effected on that day and the record so appearing when the motion to dismiss the appeal was made, the judge of the superior court granted the motion on the ground of lack of jurisdiction to try the case.

The contention of petitioner is that in stipulating that the justification would be made at a date when it would have been futile and of no effect, plaintiff in the action waived justification. The argument is thus stated by petitioner: "It is apparent that appellant would have caused justification thereof to be made had not respondent consented that it be made at another time and place. Respondent was the only person who could require justification, and he was the only person who could forego justification. Respondent in effect said to appellant, you must justify in the manner required by law, but before that time had expired, by virtue of his stipulation, he in effect said, you need not justify in the manner required by law but you can justify at another time and place, to wit: a time and place over which the court had no jurisdiction. . . . At the time of filing the stipulation, respondent had the legal right to waive the justification, and when he stated to appellant that he need not justify (which is the effect of the stipulation), it certainly must be construed as a waiver."

Respondent, quoting from volume 28 of Am. & Eng. Ency. of Law, 526, says: "Waiver is usually a question of intent, and knowledge of the right and an intent to waive it must be made to appear plainly, and this is to be determined usually from the declarations and conduct of the parties."

It is quite likely that plaintiff's attorney did not intend to waive justification. His appearance at the office of the justice of the peace on December 30th, in accordance with the stipulation, would seem to indicate such to be the fact. Still he was the moving party in the matter for whose convenience the delay was asked, and it was upon his stipulation filed in the case that the date was fixed at a time when justification would have been a nugatory act, and the superior court would have been authorized, and it was its duty, to disregard it and look only to the date when the bond was in fact filed and notice thereof given. The stipulation fixed a time when it was legally impossible to justify, and it seems to us was in legal effect a waiver, and that defendant had the right to treat it as a waiver of plaintiff's right to require justification.

To put the matter briefly as it was before the superior court and as the record shows: An undertaking was filed on its face in due form and duly executed and notice thereof served; plaintiff demanded that the sureties justify; before the day arrived for justification, plaintiff filed a stipulation that defendant might justify at a time unauthorized by the statute. Such being the facts, the superior court could not do otherwise than to treat the stipulation as a waiver and entertain the appeal on the assumption that a sufficient undertaking had been filed.

Let the writ issue commanding the said superior court to set the said cause of *Murray v. Fest* for trial on its merits and proceed with the trial thereof.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 27, 1918.

[Crim. No. 587. Second Appellate District.—April 29, 1918.]

THE PEOPLE, Respondent, v. HARRY J. BROWN,  
Appellant.

**CRIMINAL LAW—CONTRIBUTING TO DELINQUENCY OF MINOR—INFORMATION—STATUTE OF LIMITATIONS.**—An information filed November 2, 1917, charging that between October 1, 1916, and October 1, 1917, the defendant "did then and there willfully and unlawfully take and entice" his victim "away from her home and usual place of abode and did on various dates and times induce" her "to accompany defendant to various hotels and rooming-houses in the city of San Diego, and there occupy the same room and bed with defendant, and that said defendant did then and there have and accomplish sexual intercourse with" her, was sufficient as against the objection that the charge was barred by the statutory limitation of one year.

**ID.—CONCLUSION OF LAW—SURPLUSAGE IN INFORMATION.**—Such an information is not insufficient in also charging the defendant with having induced the girl "to so live as would cause and manifestly tend to cause" her "to become and remain a person coming within the provisions of the juvenile court law of the state of California," as the same may be regarded as surplusage, in view of the definite charge in the information.

**ID.—RELATIONSHIP OF PARTIES—LACK OF AVERMENT OF MAN AND WIFE—SUFFICIENCY OF INFORMATION.**—Such an information is not insufficient for failure to allege that the defendant and the girl were not man and wife at the time of the commission of the alleged acts, where the pleading does show that their surnames were different, that she was but fifteen years of age, and that he took and enticed her from her usual place of abode and induced her to live with him at various hotels and rooming-houses, where they were sexually familiar with each other.

**APPEAL** from a judgment of the Superior Court of San Diego County. T. L. Lewis, Judge.

The facts are stated in the opinion of the court.

E. L. Johnson, and Ralph F. Twombly, for Appellant.

U. S. Webb, Attorney-General, and Joseph L. Lewinsohn, Deputy Attorney-General, for Respondent.

**WORKS, J., pro tem.**—The appellant was charged with contributing to the delinquency of a fifteen-year old girl, the in-



formation having been predicated upon the terms of the juvenile court law (Stats. 1915, p. 1225; Deering's Gen. Laws, p. 766), section 21, which provides that "Any person who shall commit any act or omit the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of twenty-one years to come within the provisions of any of subdivisions 1 to 13 inclusive of section 1 of this act, or which act or omission contributes thereto, or any person who shall, by any act or omission, or by threats, or commands, or persuasion, induce or endeavor to induce any such person, under the age of twenty-one years, to do or to perform any act or to follow any course of conduct, or to so live as would cause or manifestly tend to cause any such person to become or to remain a person coming within the provisions of any of subdivisions 1 to 13 inclusive of section 1 of this act, shall be guilty of a misdemeanor." Subdivision 8 of section 1 of the act provides that the act shall apply to any person under the age of twenty-one years, "who habitually uses intoxicating liquors or habitually smokes cigarettes . . .," and subdivision 11 of that section makes the law apply to any person under twenty-one, "who is leading, or from any cause is in danger of leading, an idle, dissolute, lewd or immoral life." The evidence of appellant's guilt was directed to these two subdivisions. He was convicted and was sentenced to two years in the penitentiary.

The testimony of the victim of the appellant was to the effect that she first met him at a dance; that they frequently saw each other from that time forward and soon became engaged to be married, and that immediately after the engagement they began to indulge in sexual intercourse together, the acts being committed almost daily, over a considerable period of time, in the rooms of appellant in the several hotels and lodging-houses at which he lived during the period. The landlady of one of the places at which appellant lived testified that on a certain occasion she became suspicious that appellant had a girl in his room; that she went to the room and rapped on the door, but that he refused to admit her or to open the door; that he later came downstairs in company with the girl whose testimony is stated above; that she, the landlady, then asked him what right he had to bring a girl into the hotel, to which he replied that he was not doing anything, that he was changing his clothes, whereupon she said to him that he

had no right to receive the girl in his room and change his clothes, and that appellant responded that he would vacate the room. He did surrender the room that day. Two police officers who took the appellant into custody testified that he acknowledged to them that he had committed the sexual act with the girl. We shall refer, specifically, to the testimony of but one of these officers. He says that the appellant named the places where the sexual act had been committed between the two, the officer stating them from the stand and they being some of the places named by the girl in her testimony; that he had always intended to marry the girl, but they had trouble at various times which prevented it. Practically the entire testimony of the prosecution above stated, related to times within a year before the filing of the information against the appellant, that time being the period of limitation in such cases. The evidence of the prosecution showed, without dispute, that the appellant and the girl had never been married to each other.

In the evidence on the part of the defense there was no contradiction of any part of the testimony above stated, except that several witnesses testified that the girl's reputation for veracity was bad. At least three of these witnesses testified, however, on cross-examination, that they had seen the girl in the rooms of appellant at various times and one of them said that she had "stayed with" the appellant.

Evidence was also introduced by the prosecution tending to show that appellant had induced the girl to drink intoxicating liquors; that he had compelled her, by persuasion, threats, and blows, to prostitute her body to the uses of other men; and that he had taken from her the money derived from such prostitution. As to all this evidence there was some contradiction in the testimony of the witnesses for the defense.

It is contended by the appellant that the trial court erred in holding that the information was sufficient in the face of an objection that the charge attempted to be made by it was barred by the statutory limitation of one year, the criminal acts of the appellant having been stated in the information to have been committed "on various dates and times" between October 1, 1916, and October 1, 1917, and the information having been filed November 2, 1917. It is insisted that the charge does not negative the possibility of all the criminal acts having been committed prior to November 2, 1916. It is to be noted

that the crime of contributing to the delinquency of a juvenile may be of a continuing character; in fact, the offense is usually made of a series of overt acts or of a continuous chain of omissions. The information now before us plainly attempts to charge a crime of that character. There was no special demurrer to the information, but the claim that it was insufficient came in the form of an objection, at the trial, to the introduction of evidence in support of the charge, on the ground that, as to any offense charged in the information, "a greater portion of it is barred by the statute of limitations." The peculiar form of this objection made it practically meaningless, as it carried the inference, if not the assertion, that some portion of the charge was not barred. The objection was also made, at the same time, that the information did not charge a public offense. The point now before us seems to be within the rule announced in *People v. Griesheimer*, 176 Cal. 44, [167 Pac. 521]. In that case the defendant was charged with collecting money from the prosecuting witness by means of false and fraudulent representations. The representations were to the effect that the defendant was authorized to solicit subscriptions on behalf of a certain publication and that he had in fact collected such subscriptions from various persons. It was charged that the prosecuting witness relied on these false representations and that he was thereby "induced to and did deliver . . . money to the defendant." There was a general demurrer to the information, which the trial court overruled. In passing upon the contention of the appellant that the ruling was erroneous, the supreme court said: "We are of the opinion that as against the defendant's general demurrer the information should be held sufficient on appeal. While there is no direct allegation that the money was paid to the defendant as a subscription or loan to the 'Fatherland Magazine,' a reader of the information could hardly draw from it any other inference than that the payment was made for such purpose. It may be conceded that a direct allegation to this effect would have been more in accord with technical requirements. But what was intended to be charged in this connection is perfectly plain from the language in fact used, and no person of common understanding could fail to understand that it was substantially charged, by necessary inference, at least, that the money was paid because of the alleged false representations, and for

the purpose suggested thereby. Section 4½, article VI, of the constitution provides that: 'No judgment shall be set aside, or new trial granted, in any case, . . . for any error as to any matter of pleading, . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' We are satisfied that to reverse the judgment on this ground would be to entirely ignore this provision of our constitution." The information now before us alleges that, between the dates already mentioned, the appellant "did then and there willfully and unlawfully take and entice" his victim "away from her home and usual place of abode and did on various dates and times induce" her "to accompany defendant to various hotels and rooming-houses in the city of San Diego and there occupy the same room and bed with defendant and that said defendant did then and there have and accomplish acts of sexual intercourse with" her. To a person of common understanding this language must plainly carry the meaning that the appellant continued his illicit acts from a time on or about the first date to a time on or about the second date mentioned in the information. The charge was sufficient as against the objections made by the appellant at the trial, in view of the constitutional provision mentioned in the quotation from the opinion in *People v. Griesheimer*.

The appellant presents the further point that the trial court acted erroneously in holding the information to be sufficient over an objection that it stated but a conclusion of law in this respect, that it charged the appellant with having induced the girl "to so live as would cause and manifestly tend to cause" her "to become and remain a person coming within the provisions of the juvenile court law of the state of California." This language is used in one part of the information, it is true, but the point which is attempted to be made concerning it is divested of all importance when we remember the very definite charge which is set out above and which specifically denounces the conduct of the appellant toward the girl at various times and at various hotels and rooming-houses in San Diego. The general language inveighed against by the appellant may be treated as surplusage, for the charge against him is specifically and definitely stated in other parts of the information. The point is not well taken.

The appellant contends that the information was insufficient to charge a public offense in that it did not allege that, at the time of the commission by the appellant of the acts of which complaint is made, he and the girl were not man and wife. The information does show, however, that the surnames of the appellant and the girl were different; that she was but fifteen years of age; and that he took and enticed her from her usual place of abode and at various times induced her to go to various hotels and rooming-houses with him, where they were sexually familiar with each other. This language of the information brings the case within the terms of the opinion in *People v. Griesheimer*, from which quotation is above made. No person of ordinary intelligence could read the information without plainly understanding from its terms that the appellant was charged with committing the denounced acts upon one who was not his wife.

The appellant contends that there was error in various other particulars in the proceedings of the trial court. It is asserted that the court erred in denying an application made by appellant at the trial to the effect that the prosecution be compelled to select and specify, by date, some particular act upon which reliance would be placed for a conviction; also, in refusing to strike out certain testimony as to acts of defendant toward the girl, committed more than a year before the filing of the information; and, further, in sustaining objections to certain questions asked a witness for the purpose of impeaching the girl as to some of her testimony on the subject of her being led by appellant to indulge in the use of intoxicating liquors. In addition to these specifications of error said to have been committed by the court, the appellant insists upon a reversal because of alleged misconduct of the district attorney in the prosecution of the case. We do not find it necessary to consider the merits of any of these points, nor to state the argument by which the attorney-general meets nearly, if not quite, all of them. We need not consider these questions for the reason that none of them militate against nor minimize the fact that the appellant's guilt was established by the uncontradicted evidence stated above. Having regard to the provisions of section 4½ of article VI of the constitution, we have made a careful examination of the entire cause, including the evidence, and we are of the opinion, from

such examination, that no errors in the record, if any there be, have resulted in a miscarriage of justice.

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

---

[Crim. No. 586. Second Appellate District.—April 29, 1918.]

THE PEOPLE, Respondent, v. CHARLES H. WARRINER,  
Appellant.

**CRIMINAL LAW—INFORMATION—DOUBLE CHARGE—LACK OF PREJUDICE—SAME CLASS OF CRIMES.**—In view of section 954 of the Penal Code, which provides that an indictment or information may charge two or more different offenses connected together in their commission, or two or more different offenses of the same class of crimes or offenses, under separate counts, an information charging the defendant under two counts with having committed the crime of rape, and with having committed lewd and lascivious acts, such as are described by section 288 of the Penal Code, is without prejudice, where both crimes were alleged to have been committed on the same day and with the same female child, and the defendant found guiltless of the second offense charged.

APPEAL from a judgment of the Superior Court of San Diego County, and from an order denying a new trial. T. L. Lewis, Judge.

The facts are stated in the opinion of the court.

E. L. Johnson, and E. M. Parker, for Appellant.

U. S. Webb, Attorney-General, and Joseph L. Lewinsohn, Deputy Attorney-General, for Respondent.

JAMES, J.—By the information of the district attorney filed in this case the defendant was charged under two counts,—first, with having committed the crime of rape, and, second, with having committed lewd and lascivious acts, such as are described by section 288 of the Penal Code. Both crimes were alleged to have been committed on the same day and with the same female child, who is alleged to have been

of the age of thirteen years. The jury returned a verdict finding the defendant guilty of the crime of rape and not guilty on the second count of the information. Defendant appeals from the judgment of imprisonment entered and from an order denying his motion for a new trial.

Preliminarily it may be stated that there was submitted to the jury ample evidence to justify the verdict of guilty as returned. The only point urged on this appeal is one which goes to the form of pleading in the information. Section 288 makes it a felony for a person to commit lewd and lascivious acts with a child. There was a demurrer to the information. Appellant contends that it is not allowable to charge two offenses in the same information, both of which refer to the same acts alleged to have been committed by a defendant, where it appears that the defendant could not be guilty of both offenses. He argues that the charge is inconsistent in this case, because had the defendant been guilty as alleged in the second count of the information, he could not have been guilty of the crime of rape, and *vice versa*. Section 954 of the Penal Code provides that an indictment or information may charge two or more different offenses connected together in their commission, "or two or more different offenses of the same class of crimes or offenses, under separate counts." To our minds, it is clear that the two offenses charged by the information in this case were of the same class. On the face of the information it could not be told whether the acts relied upon to show that the crime of rape had been committed were the same as those relied upon to sustain the charge contained in the second count. Both crimes might have been committed on the same day and with the same person. The demurrer was properly overruled. Had the jury found the defendant guilty on both counts of the information and had the evidence shown that the crime of rape had been committed and no other evidence been offered against the defendant, the judgment might with more plausibility be attacked. However, the jury affirmatively held the defendant guiltless of the second offense charged, and we can see that he has suffered no prejudice by reason of the double charge made in the information. The crime of rape was charged in language sufficient to satisfy the requirement of the statute.

The judgment and order are affirmed.

Conrey, P. J., and Works, J., *pro tem.*, concurred.

[Civ. No. 2174. Second Appellate District.—April 30, 1918.]

CHAS. E. HURT et al., Respondents, v. F. J. BAUER,  
Appellant.

**APPEAL—JUDGMENT—PAYMENT—MOOT QUESTIONS—DISMISSAL.**—Where pending an appeal from a judgment directing the payment of money it is made to appear to the appellate court that the judgment has been paid in full, the questions presented upon the appeal become moot, and the appeal will be dismissed.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. H. T. Dewhirst, Judge Presiding.

The facts are stated in the opinion of the court.

C. Franklin Baxter, for Appellant.

Wm. M. Bowen, Benjamin E. Page, and Arthur C. Hurt,  
for Respondents.

**THE COURT.**—This is an action for the recovery of money, judgment having gone for the plaintiffs and the defendant having appealed. At the time set for the oral argument, the respondent was granted leave to file a certified copy of a satisfaction of judgment said to have been filed in the action in the office of the clerk of the trial court. The certified copy has been filed since and it shows a satisfaction of the judgment in full. By the payment of the judgment the questions presented upon the appeal have become moot.

The appeal is dismissed.



[Civ. No. 2340. First Appellate District.—April 30, 1918.]

**JAMES J. FLINN et al., Respondents, v. EDWIN R. ZION, Appellant.**

**MUNICIPAL CORPORATIONS—STREET WORK UNDER PRIVATE CONTRACT IN SAN FRANCISCO—RUNNING OF STATUTE OF LIMITATIONS—RESOLUTION OF ACCEPTANCE.**—Under article VI, chapter I, section 22, and chapter II, section 9, subdivisions 9 and 10, of the charter of the city and county of San Francisco, providing that private contracts for street work shall be done under the direction and to the satisfaction of the board of public works, and that such satisfaction shall be declared by resolution, the statute of limitations does not start to run against the contractor until the adoption of such resolution, regardless of the time of the actual completion of the work.

**ID.—APPLICABILITY OF CHARTER PROVISION TO CONTRACTS.**—The requirement of article VI, chapter I, section 22, of the charter of the city and county of San Francisco that private contracts for street work must contain a "provision" that all materials used must be to the satisfaction of the board of public works, applies to all contracts for street work, public as well as private, in so far as the statute of limitations is concerned.

**ID.—PERMIT FOR STREET WORK.**—The charter of the city and county of San Francisco nowhere provides that the person actually performing street work under a private contract must himself obtain the permit, the only requirement being that such permit be obtained.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. E. P. Shortall, Judge.

The facts are stated in the opinion of the court.

H. M. Anthony, for Appellant.

Fabius T. Finch, and Paul F. Fratessa, for Respondents.

**KERRIGAN, J.**—This is an action brought to recover the sum of \$341 for grading and sewerage Forty-ninth Avenue, San Francisco, in front of the defendant's property. The contracting firm of Raish & Clark had a private contract for doing this work signed by all the property owners except defendant. This firm assigned its contract to plaintiffs herein to do the work, and defendant contracted with the assignees

for his frontage. Judgment was rendered against the defendant for the sum sued for, and defendant appeals.

Two grounds are urged for reversal—first, that the action is barred by the statute of limitations; second, that the contract is unlawful for the reason, it is claimed, that the work was done without a permit from the board of public works.

We do not consider there is merit in either contention.

With reference to the first, while it appears that the physical work was completed on March 11, 1914, it was not until April 13th following that a resolution was adopted by the board of public works accepting the work. Suit was filed March 24, 1916, which was in ample time. The claim of appellant that the statute commenced to run from the actual completion of the work and not from the date of the acceptance cannot be maintained. This contention is based upon the assumption that the contract, being a private one, no acceptance of the work was required, the charter containing no provision for the acceptance of such contracts. We do not so read the act. Its provisions with reference to street work are to be found in article VI thereof. Subdivisions 9 and 10 of section 9, chapter II, of that article deal with the performance of private contracts for grading and other characters of street work. It is true that nowhere in these subdivisions is there any express provision made for acceptance by the board for work done thereunder. Section 22 of chapter I, however, provides that all work performed under article VI must be done under the direction and to the satisfaction of the board of public works, and that the materials used must be in accordance with specifications, and also to the satisfaction of the board, and that all contracts provided for under article VI must contain a provision to that effect. The section further provides that when work shall have been completed to the satisfaction and acceptance of the board, it shall so declare by resolution, and thereupon deliver to the contractor a certificate of acceptance. Counsel for the appellant seeks to avoid the force of this section by claiming that it applies only to public written contracts where an assessment is made; and that his contract being a private and oral one, the section does not apply to it. In this behalf it is argued that the section, by requiring that contracts contain a provision that the work be done under the direction and to the satisfaction of the board, indicates by the use of the word "provision" that a

written contract was intended. The section does not admit of such a construction. By the adoption of this section the manifest intention of the framers of the charter was to have the charter provisions in relation to street work form a part of all contracts for street work, public as well as private, and to place the performance of such contracts under the supervision and control of the board of public works. The contract under which the work in question was performed is not before us, but appellant agreed with the contractor to pay for his proportion of the same, and the work having been performed, upon its acceptance by the board a right of action accrued against him, and he became liable for the amount agreed upon.

The claim that the contract is unlawful is based upon the assumption that no permit to perform the work was ever obtained from the board.

The record shows that a permit was obtained by Raish and Clark before the work commenced, and thereafter and before its completion a renewal in modified form was had. The charter nowhere provides that the person actually performing the work must himself obtain a permit, the only requirement being that such permit be obtained. This was done.

From what we have said it follows that the judgment should be and it is hereby affirmed.

**Zook, J., pro tem., and Beasley, J., pro tem., concurred.**

---

[Civ. No. 2329. First Appellate District.—May 1, 1918.]

**JOE M. PARK et al., Appellants, v. PACIFIC FIRE EXTINGUISHER COMPANY (a Corporation), et al., Respondents.**

**STREET LAW—INSTALLATION OF ELECTRIC LIGHTING SYSTEM—IMPROVEMENT ACT OF 1911.**—The installation of an electric street lighting system in a municipality is authorized by the Improvement Act of 1911 (Stats. 1911, p. 730), notwithstanding the title of the act provides for "work" in and upon streets, as subdivision 2 of section 79 in defining the word "work" was intended to include street-lighting systems.

**ID.—ENACTMENT OF PUBLIC UTILITIES ACT OF 1913—IMPROVEMENT ACT OF 1911 NOT REPEALED BY IMPLICATION.**—The Improvement Act of

1911 covering street improvement alone was not repealed by implication by the Public Utilities Act of 1913 covering the acquisition of public utilities.

**ID.—CREATION OF STREET-LIGHTING SYSTEM—PROCEDURE UNDER IMPROVEMENT ACT OF 1911—RIGHT OF MUNICIPALITY.**—While street lighting is a municipal affair, where the municipality has not provided a complete procedure for the creation of a street-lighting system as empowered to do by its charter, it may follow the provisions of the Improvement Act of 1911.

**ID.—CONNECTION OF WIRES WITH ELECTRIC DISTRIBUTING SYSTEM OF PUBLIC UTILITY—CONSTITUTIONAL AMENDMENT NOT VIOLATED.**—The improvement of streets by the construction and installation of electroliers and a conduit system for the purpose of lighting such streets, cost of the improvement to be made a charge upon the property within the district, does not violate section 1 of article XIV of the amendments to the constitution of the United States, in providing that the electroliers be wired and connected by the underground system of conduits with a public utility company's lines, since the improvement does not become the property of the utility company, but the property of the city.

**ID.—REFERENCE TO STREETS TO BE IMPROVED—INSUFFICIENCY OF RESOLUTION OF INTENTION.**—A resolution of intention for improving streets in installing an electric lighting system, not naming the streets, and providing that the work was to be done according to certain specifications which did not name the streets, but referred to plans attached which contained a legend designating colors by which the proposed improvements could be located, does not comply with the requirements of section 3 of the Improvement Act of 1911, providing that the resolution of intention shall refer to the street to be improved by its lawful or official name or by the name by which it is commonly known.

**APPEAL** from a judgment of the Superior Court of Alameda County. William H. Waste, Judge.

The facts are stated in the opinion of the court.

Richard B. Bell, and R. M. F. Soto, for Appellants.

Wilson & Haines, O. C. Wilson, Martin L. Haines, Frank D. Stringham, and B. D. Marx Greene, for Respondents.

**BEASLY, J., pro tem.**—In this case the plaintiffs resist the action of the city of Berkeley in ordering the improvement of certain streets of that city by the construction and installation of electroliers and a conduit system for the purpose of

lighting its streets. The specific relief sought is injunction *pendente lite* against the performance of a contract let for the above purpose, and a final judgment that this contract is void. The judgment of the trial court was for the defendants, and this appeal is from that judgment on the judgment-roll, consisting of the complaint, answer, findings, and judgment.

The work was to be done under the Improvement Act of 1911 and its amendments, [Stats. 1911, p. 730], and in accordance with specifications previously adopted by the city council generally covering such work. A resolution of intention, adopted by the council on December 3, 1915, provided that 232 electroliers be installed within the limits of a district fully described, the cost of the improvement to be made a charge upon the property within the district, and that the electroliers be wired and connected by an underground system of conduits with the electric distributing system used for the lighting of the streets of Berkeley, the work to be done in accordance with the specifications above referred to and adopted by a resolution of the council. These specifications were referred to in the resolution of intention by number, and were by the language thereof specifically incorporated therein and made a part thereof; and the resolution also provided that the work be done in accordance with the Improvement Act of 1911 and its amendments, as above stated. The specifications described the work to be done more definitely and more at length than the resolution of intention, but they do not add anything to its provisions except that they provide for the connection of the lighting system of the city with the Pacific Gas & Electric Company's lines.

The findings were in accordance with the complaint, determining the foregoing facts as therein alleged except as to the posting of notices of the improvement and the affidavit of posting, which in the view we take need not be noticed.

The trial court held the contract valid.

The first objection relied upon by the appellants is that the improvement described in the resolution of intention is not authorized by the Improvement Act of 1911 as amended.

Section 2 of that act, under which the city of Berkeley undertakes to do this work, if valid, empowered the city council to order the construction or reconstruction upon its streets of poles, posts, wires, pipes, conduits, lamps, and other suitable or necessary appliances for the purpose of lighting its

streets. This, it is claimed, is repugnant to the provisions of section 24, article IV, of the constitution, to the effect that every act of the legislature shall embrace but one subject, which subject shall be embraced in its title. The specific ground of the objection under consideration is that the act describes all the work therein contemplated as street work, and that the work provided for by this resolution of intention is neither street work nor street improvement.

The title of that act in so far as it is involved here is this: "An act to provide for work in and upon streets," etc.; and if the word "work" as used in the act does not include this species of improvement, the contract in issue here must be held invalid. Counsel cites a number of cases in some of which at least it is held that street work does not include the installation of a lighting system. Typical of those cases is *Electric Light & Power Co. v. San Bernardino*, 100 Cal. 348, [34 Pac. 819], wherein it is held that the term "street work" is a phrase in common usage and has a well-defined meaning, and, says the court in that case, "the words mean exactly what they indicate upon their face, namely, work upon a street, work in repairing or making a street"; and it was there held that the installation of an electric lighting system, differing considerably, however, from the system in question here, was not street work within the meaning of those words. The case did not arise under the statute of 1911, but under the general Municipal Incorporation Act as amended in 1891 (Stats. 1891, p. 54).

The other cases cited by appellants are of similar import. None of them, however, arose under the act of 1911; indeed, they were all decided before that year. We do not think it necessary to analyze and distinguish these cases, although this might conceivably be done, for the legislature has in effect in the act of 1911 defined what it meant by the words in the title thereof. In subdivision 2 of section 79 of said act (Stats. 1911, p. 766) is the following provision: "The words work, improve, improved, and improvement, as used in this act shall include all work mentioned in this act, and also the construction, reconstruction and repairs of all or any portion of said work." Read in connection with the provisions of section 2 of the act, this provision shows clearly that the legislature had in mind the inclusion of everything contained in section 2 thereof when it used the word "work" in its title.

The purpose of section 24 of article IV of the constitution is to protect the members of the legislature as well as the public against fraud from deceitful and misleading titles; and if the title is of such a character as to mislead the public or the members of the legislature as to the subject embraced in it, then section 24 applies. But it is not necessary that the title of an act should embrace an abstract or catalogue of its contents; and where the title of an act is not misleading, the act will not be held void simply because of the fact that its title does not so catalogue or schedule every item contained therein.

These propositions are so well settled as to need no citation of authority, and, indeed, are quotations from numerous cases decided by the supreme court. That the legislature was not misled by the use of the word "work," but intended to include a provision in the act for the installation of a street lighting system, is quite apparent from the language above quoted. The legislature had authority to so define the words used in the title if it chose to do so; and, therefore, as it has done so and it is apparent that it had these matters in mind, the court will not hold this act unconstitutional because the legislature did not itemize a lighting system as a part of the street work. Indeed, a lighting system is as necessary to the convenient use of streets in the present age in a city the size of Berkeley as is the pavement of the street itself; and the tearing up of the streets to place conduits therein for the purpose of laying wires for conducting electricity for lighting purposes is quite as much street work, it seems to us, as any other work upon a street.

It is next contended that the Improvement Act of 1911 has been suspended by the Public Utilities Act of 1913 (Stats. 1913, pp. 421, 429). The act of 1911 covers street improvement alone. That of 1913 covers the acquisition of public utilities. As these two purposes are intimately connected with each other, the provisions of the latter statute overlap the former, but they are not so inconsistent with it as to repeal it; and they are certainly not so repugnant that it must be held that the Public Utilities Act of 1913 repealed the Improvement Act of 1911 by implication. There is, indeed, a strong reason for concluding that the legislature had no such intention when it enacted the Public Utilities Act, for in that act it expressly repealed the Improvement Act of 1905 [Stats. 1905, p. 564], and at the same time failed to mention the Improve-

ment Act of 1911. It must, therefore, be concluded that the legislature intended to repeal the act of 1905, but did not intend to repeal the act of 1911.

The appellants next contend that the city of Berkeley had exclusive authority to provide for the lighting of its streets as a municipal affair under charter provisions, and that, therefore, the Improvement Act of 1911 does not apply to that city.

Street lighting is a municipal affair; but the charter of the city of Berkeley, while conferring power upon the city to adopt a complete procedure for the creation of a system of street lighting, does not contain such a procedure. This is conceded. The city has power to provide such general scheme; but not having done so, it is governed by general law in that respect, and may in this case follow the provisions of the Improvement Act of 1911. (*Fragley v. Phelan*, 126 Cal. 383, [58 Pac. 923].)

The next objection to this proceeding is that the proposed assessment for the improvement described in the resolution of intention, if made, would violate the constitution of the United States. It is claimed that it will constitute a part and parcel of the public utility now owned and controlled by a public service corporation, namely, the Pacific Gas and Electric Company, mentioned in the resolution of intention. But this does not appear to be so. It seems to us that the proposed improvement will become the property of the city of Berkeley, and that the only connection that it has with the Pacific Gas and Electric Company is a physical connection with that company's lines for temporary convenience. We do not see that this in any way violates section 1 of article XIV of the amendments to the constitution of the United States.

The final attack upon this contract and the proceeding upon which it is based is grounded upon the following considerations: It is provided in section 3 of the Improvement Act of 1911 that before ordering any work to be done or improvement made the council shall pass a resolution of intention so to do, "referring to the street by its lawful or official name, or the name by which it is commonly known." This resolution does not name or refer to the streets to be improved; but it is contended by the respondents that the specifications and plans for the work referred to therein do so, and that this fulfills the requirement in question. The reference relied on is in



these words: "All the work to be done in accordance with the specifications contained in resolution adopting specifications #317 N. S. for the construction of single lamp or electroliers and conduit system." The specifications do not contain the names of the streets nor any reference to them, unless the provision of the specifications that the "plans attached hereto, sheets No. 1, 2 and 3, are to be considered with and are hereby made a part of these specifications," are sufficient to comply with the statute. These plans are engineering prints, and are marked "Lighting District No. 1, showing location of electroliers and conduits, Berkeley, California," and they contain a legend explaining the colors by which the location of the electroliers, conduits, and other details of the work are shown.

In construing this portion of the proceeding the purpose of the provision that the streets shall be named in the resolution of intention must be taken into account. That purpose seems to be the giving of information to the property owners as to the intention of the city council to improve the street in front of their property, or some other streets, the expense of which will be made a burden upon their property by taxation. Section 6 of the act provides that any owner of property liable to be assessed for the work may make written protest against the proposed work, or against the extent of the district to be assessed, or both, and provides the method by which such protest shall be made to the council. The method which the property owner must follow under this proceeding as above outlined in order to ascertain whether his property is to be made liable for this street improvement is first to examine the resolution of intention, which would advise him that the property within a certain district was to be taxed for a certain improvement upon certain streets; but these streets were not named in the resolution of intention, and therefore he must look further in order to ascertain upon what streets the improvement is proposed to be made. Accordingly, he must consult the specifications, and in the specifications he would find nothing except a reference to a map or plan, and this map or plan is an engineering plan; and while in this case simple and comparatively easy to understand by a person in the least accustomed to reading such documents and interpreting them, it would not be easy, and perhaps would not be possible, for many persons who might

own property within a district such as this in which improvements upon the streets were to be made, to ascertain by an inspection of the plan exactly what particular streets were to be improved. Indeed, this plan only purports to show the approximate location of certain portions of this work, namely, the feeder risers; and if it can be held that the reference herein is sufficient, and that these plans in themselves were notice of the points at which this improvement was to be made, a plan approximating the location of all the work might be sufficient to fulfill the measure of the statutory requirement.

With the contention that this is so we cannot agree. We think that the city council should mention the streets to be improved by their lawful or official names or the names by which they are commonly known, in the resolution itself; or, at the very least, should plainly state in the specifications the names of the streets to be improved, so that, without the trouble of inspecting engineering plans, the property owner might know exactly for the improvement of what streets his property is to be assessed. It seems to us that there is no excuse for not following this simple requirement of the statute; and further, that the rule adopted in construing the Vrooman Act [Stats. 1885, pp. 160, 161], by which a reference in the resolution of intention to plans and specifications on file for the purpose of supplementing the general description of the work in the resolution itself, would be unduly stretched by permitting such a reference as was attempted here.

We have thought proper to consider all the points raised in view of the fact that the city council of Berkeley may still wish to proceed with this work under a resolution of intention sufficient in form for that purpose within the views herein expressed.

The judgment is reversed.

Kerrigan, J., and Zook, J., *pro tem.*, concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on May 31, 1918, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on June 27, 1918.

[Crim. No. 426. Third Appellate District.—May 1, 1918.]

THE PEOPLE, Respondent, v. KATE FROST, Appellant.

CRIMINAL LAW—MURDER—INTEMPERATE REMARK OF DISTRICT ATTORNEY—INSUFFICIENT GROUND FOR REVERSAL.—In a prosecution for murder, the statement of the district attorney in his closing address to the jury that the defendant, if turned loose, would go back and mix a little more booze with her Indian blood, and kill another man, while somewhat intemperate, is not a sufficient ground for reversal.

ID.—COMMUNICATION TO JUROR AFTER RETIREMENT—LACK OF PREJUDICE.—In such a prosecution, the act of the sheriff, after the jury retired, in transmitting a communication to one of the jurors from his wife to the effect that anthrax had appeared among the juror's cattle cannot be held to have influenced such juror to consent to a verdict by reason of the urgent necessity for his presence at home.

APPEAL from a judgment of the Superior Court of Yolo County, and from an order denying a new trial. W. A. Anderson, Judge.

The facts are stated in the opinion of the court.

Shelley & Johnston, and John A. McGilvray, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

BURNETT, J.—Defendant was convicted of murder in the second degree and she appeals from the judgment and order denying her motion for a new trial. It is admitted that she killed the deceased with a butcher-knife, but it was and is the contention of defendant that his death was the result of an accident. Her account of it is as follows:

“Well, I was fixing potatoes for supper, boiled potatoes, and I was cutting the ends of them off so salt would go through them when you cooked them, and as I was standing there it was kind of dark and it was—the shade from the levee—the levee is so high you can't see when the moon does shine. I was standing with my elbows on the scow this way; I heard some queer noise; I could not say what it was. I

whirled around that way in the dark; I whirled so quickly he fell right over on me, and I had the knife in my hand and my arm something like that—see!—and he came right down on me and caught himself with his hand, and I says, ‘Oh, my God!’ and he pulled himself back and says, ‘Oh, Kate, I’m hurt!’ ”

But the jury was justified in utterly rejecting her explanation of the gruesome affair. Indeed, one cannot read the entire record carefully and dispassionately without having an abiding conviction that her infliction of the wound was the result of a deliberately formed intention to take the life of the deceased, and that her contention as to it being an accident was an afterthought, a simulated defense, improbable, not worthy of credence, and justly repudiated by the jury.

We shall not set out the evidence at length. It is sufficient to say that it was shown that she had made threats to kill the deceased; that they were heard talking in a loud tone of voice for some time before the killing; that her conduct after the discovery by others of the crime was that of a guilty person; that she did not immediately declare that it was an accident; on the contrary, expressed a willingness to suffer the extreme penalty of the law, and, when it did finally occur to her to claim that the killing was accidental, her repeated story varied in important particulars and was stamped as inherently improbable by the following testimony of the physician who performed the autopsy: “There was only one wound on the body except the wounds that had been made by the undertaker in preparing it. The wound was just above the left clavicle or left collar-bone. It was an incised and penetrating wound on the surface, about an inch and a half in the long diameter. The wound following down was almost directly downward and slightly inward, going in just back of the collar-bone. During the course of the instrument that made the wound the superficial structures were severed, the nerves going to the left arm, the roots of the nerves were cut. The left subclavian artery and vein were cut, the artery not quite in two; and then coming further down the apex or top of the left lung—there was a cut in that about an inch long. . . . The wound was almost parallel to the lung diameter—very slightly inward.”

The doctor further testified that it would be impossible for such a wound to be inflicted by one falling on a knife unless

the injured person "was bent absolutely over so his body was in a horizontal position; not if he was standing."

Indeed, it is plain that the wound could not have been and was not inflicted as claimed by appellant. The only rational conclusion is that she plunged the knife intentionally into the body, and this is the basis upon which we must consider the alleged errors to which our attention is directed.

1. In examination of one of the jurors upon his *voir dire* the district attorney made the following hypothetical statement of the burden of proof: "You understand, do you not, Mr. Armstrong, that if the prosecution has established the fact that the defendant killed the deceased and unless the prosecution also shows in their proof facts which would excuse the defendant from the crime of murder or some other fact which would excuse the defendant from the crime of murder, or some other fact which would discharge her of any crime, malice is presumed and the burden of proof is upon the defendant to show by a preponderance of the evidence that she was justified in what she did?" This seems to have been approved at the time by the trial judge.

The foregoing is not in the exact language of section 1105 of the Penal Code, to which section it was plainly designed to conform, but conceding a measure of inaccuracy to the statement, it is clear that it was without prejudice in view of the evidence in the case. Appellant in support of her claim that it embodied a wrong interpretation of the law quotes the following from *Perkins v. State*, 124 Ga. 6, [52 S. E. 17]: "Murder does not consist merely in killing a human being. The killing must be done with malice. When the fact of the killing is shown and the evidence adduced to establish the killing shows neither circumstances of justification or alleviation, malice may be inferred. Likewise if the statement of the defendant admits the homicide without explanation malice may be inferred from such admission. But if, at the time of the admission, the homicide is justified, such qualification of the admission robs it of the vital element of murder."

Herein, however, there was evidence of murder without the admission of defendant. Besides, the jury had the right to believe that at first she made no explanation nor attempt at justification, and it may be added that her asserted theory of accident is so inherently improbable as to be worthy of no consideration.

Apart from the foregoing, we may say—the jury were fully and correctly instructed at the close of the trial and directed to follow only those instructions. Hence it is apparent that if any such error as claimed was committed, it was cured by the subsequent action of the court.

2. At most, it could be said that the district attorney was somewhat intemperate in the following statement contained in his closing address to the jury: "You know what she will do, gentlemen of the jury. They ask you to excuse her. Why? Because he was full of booze and because she had Indian blood in her, and probably a little booze aboard too and she was full of fight. Now, gentlemen of the jury, is that any excuse—is that any reason why you should turn her loose and let her go back and mix a little more booze with that Indian blood and kill a man? That is exactly what will happen if you turn her loose; she will go back and kill another man."

We must assume that the district attorney was acting in good faith; that his remarks were in response to the argument of appellant's counsel, and we cannot say that the inference that she would commit another murder was unjustifiable, as a person capable of committing one murder might be liable to commit another. We need not refer to the cases on this subject. Much more objectionable statements on the part of the prosecuting officers have been held to be insufficient to warrant a reversal of a conviction of murder.

3. After the jury retired, the sheriff, in violation of section 1128 of the Penal Code, transmitted a communication to one of the jurors from his wife. This was heard by all the jurors, and was to the effect that anthrax had appeared among the juror's cattle on his ranch at Madison, and it included also the juror's direction in reply for the sheriff to have Dr. Alexander go out to the ranch as soon as possible. The sheriff communicated with Dr. Alexander, and the latter said he would go out in the morning. This was reported to said juror and he said that would be all right. The argument is that the juror was thereby induced to agree to a verdict by reason of the urgent necessity for his presence at home. It is thought, also, that the circumstance may have unduly influenced other jurors. The point is emphasized by reason of the fact that a short time before the jury had requested a statement from the court of the penalty for manslaughter, thus

evinced a consideration of the possibility of finding such verdict.

It is unfortunate that such incident occurred, and the sheriff should have consulted with the judge of the court before communicating with the jury, but we think it would be an unwarranted aspersion on the character of any of the jurors to hold that he would permit a circumstance like that to influence him to consent to a verdict against the defendant.

Is it not more likely that the jurors were thereby influenced to reach a more favorable conclusion than otherwise? They certainly would have been warranted in finding a verdict of murder in the first degree, but they agreed upon the lesser offense. At any rate, under the rule as now recognized, we cannot presume that the irregularity resulted in prejudice to the defendant. (*People v. Disperati*, 11 Cal. App. 469, [105 Pac. 617]; *People v. Cord*, 157 Cal. 562, [108 Pac. 511].)

Some cases are cited by appellant wherein somewhat similar situations were held to involve error and to raise a presumption of injury, but now from the nature of the error itself or from other circumstances, it must appear affirmatively that harm was done to the defendant. It would have been safer practice for the district attorney to show that the jurors were not improperly influenced. Notwithstanding, we do not think the case should be reversed for a failure to do so.

The case of *Stocks v. State*, 91 Ga. 831, [18 S. E. 847]—as well as some others—cited by appellant, involved more serious and distressing news than herein, relating as it did to serious illness in the family of one of the jurors. Of course, it is important that all of the safeguards for the protection of the jury from extraneous influences be scrupulously maintained, and we do not approve of the course pursued in this matter, but we do think it should not be accorded the significance for which appellant contends.

4. In her criticism of the instructions of the court appellant claims that "No. 8" involves error for the reason that "it took from the jury the question of accidental killing."

Appellant is mistaken. It simply stated the presumption that a person "is supposed to mean to do that which he actually, intentionally, and willfully does in fact do." Of course, it would be a contradiction in terms to say that a person *accidentally* does what he *intentionally* and *willfully* does.

The instruction was probably unnecessary as involving a self-evident proposition, but it was not erroneous.

The same objection is made to instructions No. 9 and No. 13, and is equally without merit. These were all hypothetical instructions entirely inconsistent with the theory of accidental killing, but they left it to the jury to determine whether the facts, upon which they were based, were shown by the evidence.

Indeed, we may say that the jury were fully instructed as to every phase of the law—every instruction requested by the defendant having been given, and there seems to be no ground for criticism as to the action of the court in that respect.

The sum of the whole matter is that the record clearly reveals the guilt of the defendant, and she was fortunate in securing the verdict that was rendered, and any errors that may have been committed should be disregarded as without prejudice, if such are to be overlooked in any criminal case. (*People v. Lee*, 34 Cal. App. 702, [168 Pac. 694].)

The judgment and order are affirmed.

Chipman, P. J., and Hart, J., concurred.

---

[Civ. No. 1701. Third Appellate District.—May 1, 1918.]

C. L. HOFFMAN et al., Respondents, v. PACIFIC COAST CONSTRUCTION COMPANY (a Corporation), Appellant.

**PLEADING—OMISSION OF PRAYER—RELIEF.**—In view of the provisions of section 580 of the Code of Civil Procedure, the plaintiff in an action may have some relief although the complaint omits the prayer therefor as required by section 426 of such code, where issue has been raised by answer.

**ID.—AMENDMENT OF COMPLAINT—SUPPLYING OF PRAYER.**—The prayer to a complaint, when omitted, may be amended or supplied to conform to the cause of action stated in the complaint.

**ID.—ATTACHMENT—COMPLAINT OMITTING PRAYER.**—A complaint in an action for money, although containing no prayer for relief, is sufficient as a basis for a writ of attachment, where the pleading is accompanied by the affidavit and undertaking required by the statute, notwithstanding in its then form, no answer having been filed, a judgment could not be legally entered.



APPEAL from an order of the Superior Court of Tehama County refusing to dissolve an attachment. John F. Ellison, Judge.

The facts are stated in the opinion of the court.

Karl F. Kennedy, for Appellant.

Robinson & Robinson, and McCoy & Gans, for Respondents.

CHIPMAN, P. J.—This is an appeal from an order denying defendant's motion to dissolve attachment.

Appellant rests its appeal upon the sole ground that the "complaint is insufficient to constitute a basis for said attachment," and this for the reason that the complaint contained no prayer for relief when the levy was made under the writ of attachment.

The action is for money, to wit, the sum of \$503.11, alleged to have been paid out to and for defendant at its special instance and request, no part of which has been paid and the same is now due and unpaid. The complaint was filed May 26, 1916, and summons was issued. With the complaint were filed affidavit on attachment and undertaking. On the same day the writ was issued and a certain lot of pipe attached by the sheriff and taken into his possession. The complaint stated a cause of action for attachment as did the affidavit. The writ duly issued and was duly executed and the proceedings were in due form except, as is contended, that the complaint lacked a necessary element to confer jurisdiction on the court, to wit, a prayer for the relief which the plaintiff claims. This contention arises out of the provisions of section 426 of the Code of Civil Procedure, which reads as follows: "The complaint must contain: 1. The title of the action, the name of the court and county in which the action is brought, and the names of the parties to the action; 2. A statement of the facts constituting the cause of action, in ordinary and concise language; 3. A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount thereof must be stated."

Appellant's position is concretely stated in the following paragraph of its opening brief: "As to the proposition of a 'complaint' possessing a caption followed immediately there-

after by a prayer, it requires no citation of authority to prove that such paper would be quite worthless, under the second subdivision of the section. It cannot, therefore, be logically urged that any different rule should apply, in the event of an entire omission of the third required part of a complaint, namely, the prayer. The language of the third subdivision is not only as forcible, but is even more emphatic. ' . . . The amount must be stated.' Considering its wording, its shoulder-to-shoulder position with the other two subdivisions, and the practical reason for its existence, there can be no question, we believe, but that the third subdivision's terms must be abided by, or the paper filed as a complaint is quite void."

It becomes necessary to trace the further proceedings in the case, chronologically stated, as to which no step was taken by either party until in the early part of the year following the filing of the complaint and issuance and service of the writ.

On February 19, 1917, defendant filed notice that on March 2, 1917, it would move the court to dissolve the attachment on the ground "that the complaint upon which said attachment proceedings were based stated facts which are insufficient, and said complaint is insufficient to constitute a basis for said attachment; that said motion will be based upon all the papers, records, and files in this action."

On March 2, 1917, plaintiff filed an amended complaint alleging the corporate capacity of the defendant, which had been omitted in the original complaint. Otherwise the original complaint was unchanged.

A notice of motion by plaintiff, dated March 10, 1917, appears in the record, that plaintiffs would on March 19, 1917, move the court for leave to file a second amended complaint, form of which accompanied the motion and was the same as the first amended complaint, except that it contained the usual prayer for relief. The motion was based upon the grounds "that in the original and first amended complaint of said plaintiff, a prayer for relief, based on the facts alleged in said complaint and first amended complaint, was inadvertently omitted, and that leave to amend said complaint by inserting such prayer as the facts alleged justify should be granted in furtherance of justice and under the provisions of section 473 of the Code of Civil Procedure. Said motion will be based upon the said proposed amended complaint, and the

affidavit of James S. Moore, Jr. (of counsel in the case), copies of which are served herewith, upon this notice, and upon the papers, records and files in said cause."

Notice is in the record bearing no date, signed by defendant's attorneys, "appearing not generally but specially and solely for such purpose," that on March 19, 1917, defendant would move the court for an order dismissing the action on the ground that "neither the original nor the amended complaint herein contains a prayer, as imperatively demanded by section 426 of the Code of Civil Procedure, of the state of California, that the facts stated in said complaint are insufficient to constitute a cause of action, and that the court has no jurisdiction to try the said cause, and that the county clerk of Tehama County had no lawful power or right to file said complaint."

It does not appear when these various motions were in fact heard. But on April 2, 1917, the court granted leave to file a second amended complaint by the following order:

"(Title of Court and Cause.)

"Order Granting Leave to Amend.

"Good cause appearing therefor, and on motion of Messrs. Robinson and Robinson and Price and Messrs. McCoy and Gans, attorneys for plaintiffs herein, and on reading the notice and affidavit on file herein; It is hereby ordered that plaintiffs be and they are hereby granted leave to file their second amended complaint in words and figures as set out and with said notice of motion for leave to amend.

"Dated this 2 day of April, 1917.

"JOHN F. ELLISON,

"Judge of the Superior Court."

Thereupon and on the same day the second amended complaint was filed. On the following day, April 3, 1917, the court made the following order denying the defendant's several motions: "The defendant's motion to quash the service of summons in this action is denied. The defendant's motion to dismiss the action is denied. The defendant's motion to dissolve the attachment is denied. The defendant allowed ten days within which to answer or demur to the complaint." Without further appearance in the case, defendant filed its notice of appeal.

It thus appears that the second amended complaint was on file before the court had ruled upon defendant's motions. The points on which defendant relies are: That in the absence

of a prayer for relief, the court was without jurisdiction, quite as much so as if the pleading wholly failed to indicate the court, in which latter case such would be the result. (Citing 31 Cyc. 94, and cases.) Hence, it is urged, that as the prayer is an essential element to confer jurisdiction, under section 426 of the Code of Civil Procedure it follows that the court had not jurisdiction. Defendant's second contention is that as the court did not have jurisdiction, its order to issue the attachment was void, for the reason that there was nothing to support the writ.

It is further claimed "that absence of the prayer vitiates the purported complaint, and amendment was impossible. But," proceeds the brief, "assuming that the law were otherwise, and permitted the insertion of a prayer by amendment, it would still be true that until such insertion the court would be powerless to do aught but order such insertion. And any process, attachment, or other ruling would be valueless until the insertion of that *ad damnum* clause stating a jurisdictional amount. Respondents' first opportunity to have a valid attachment issued would arise *after* the order allowing the insertion."

Doubtless where there is no answer and hence no trial of issues of fact no judgment could be entered in the absence of any demand for relief. A default judgment could not legally be given and made if the complaint were prayerless. But it does not follow that the court is without jurisdiction to order a writ of attachment to issue where a cause of action is stated, pursuant to subdivision 2 of section 426 of the Code of Civil Procedure, though the prayer for relief is omitted in the complaint.

Section 580 of the Code of Civil Procedure provides that "the relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint and embraced within the issue." This section plainly shows that the plaintiff may have some relief without regard to the prayer where an issue has been raised by an answer. (*Johnson v. Polhemus*, 99 Cal. 240, 244, [33 Pac. 908]; *Woods Central Irr. D. Co. v. Porter Slough D. Co.*, 173 Cal. 149, 153, [159 Pac. 427]; *Murphy v. Stelling*, 8 Cal. App. 702, [97 Pac. 672].) In *Donovan v. McDewitt*, 36 Mont. 61, [92 Pac. 49], the court

said: "It is true that the prayer is made a part of the complaint by section 671 of the Code of Civil Procedure; but it is made such part independently of the statement of facts constituting the cause of action. And, if the facts stated in the body of the complaint entitled the plaintiff to any relief, a general demurrer will not lie, no matter what may be the form of the prayer, or, indeed, whether there is any prayer at all. (*Hiatt v. Parker*, 29 Kan. 765; *Culver v. Rodgers*, 33 Ohio St. 537; *Sannoner v. Jacobson & Co.*, 47 Ark. 31, [14 S. W. 458]; *Parker v. Norfolk etc. Ry. Co.*, 119 N. C. 677, [25 S. E. 722].) It may be that the plaintiff cannot recover a money judgment without a prayer in his complaint demanding the same and stating the amount to which he deems himself entitled."

Both the questions of jurisdiction and amendability of the complaint where the prayer was lacking were considered in *Eldon Ice Co. v. Van Hooser*, 163 Mo. App. 591, [147 S. W. 161], where the court said: "But where a petition is in all respects sufficient save for the omission of a prayer, as is this one, we do not believe that defect so far nullifies the paper as to deprive it of the efficacy of an invocation of jurisdiction, or that it is so far defective as not to afford a base for amendment. The omission of a prayer will not destroy jurisdiction."

We quote the following from *Sannoner v. Jacobson & Co.*, *supra*, which has our concurrence: "The question then is narrowed to this: Is the omission of a prayer for judgment so grave a matter as to be fatal to the action? If it is not fatal to the action, the intervener cannot be heard to complain. The statute declares that 'the court must in every stage of action disregard any error or defect in the proceeding which does not affect the substantial rights of the adverse party.' In a suit upon an account for money advanced like the one under consideration, the only relief to which the plaintiff can be entitled is at once apparent from the allegations of the complaint, and the omission of the demand for judgment cannot be said to affect the substantial right of any adversary."

It has been held that, although, under section 430 of the Code of Civil Procedure, a demurrer to the complaint on the ground that the court has no jurisdiction may be interposed, a demurrer does not lie to the prayer. (*Allhof v. Conheim*, 38 Cal. 230, [99 Am. Dec. 363]; *Bailey v. Dale*, 71 Cal. 34,

[11 Pac. 804].) To determine the question of jurisdiction we must look to the averments of the complaint setting forth the facts constituting the cause of action. It was said in *Lehnhardt v. Jennings*, 119 Cal. 199, [48 Pac. 56, 51 Pac. 195], that "it has never been held that the prayer of the complaint should conclude the question of jurisdiction." In *Kohler v. Agassiz*, 99 Cal. 9, [33 Pac. 741], the court said: "Even on demurrer to the complaint the defendants cannot object to the prayer, and certainly, so long as the complaint contains every essential of an action upon contract, they cannot upon motion (to dissolve) an attachment accomplish what they could not upon demurrer." It was held in that case that a motion to dissolve an attachment could not be turned into a demurrer, but that on such motion "we are simply to determine whether: 1. The complaint showed the action to be founded upon contract, express or implied. 2. Whether it states facts sufficient to constitute a cause of action against the defendants; and if not, 3. Does it appear therefrom that it can be so amended as to state a cause of action upon contract? As against a non-resident debtor, these questions being answered in the affirmative, we must not concern ourselves further with the complaint."

In *Hale Bros. v. Milliken*, 142 Cal. 137, [75 Pac. 653], the court said: "If the complaint sets forth a cause of action upon a contract, express or implied, it cannot be attacked for ambiguity or uncertainty, and not even whether it states a cause of action if it appear therefrom that it can be so amended as to state a cause of action upon contract; in other words, the motion cannot be turned into a demurrer to the complaint. (*Kohler v. Agassiz*, 99 Cal. 9, [33 Pac. 741].) If we may inquire whether the complaint is capable of amendment in accordance with rules governing amendments, it would seem to follow that such amendment may be made pending the hearing on a motion to dissolve the attachment. So held, we think, in *Hathaway v. Davis*, 33 Cal. 161; *Hammond v. Starr*, 79 Cal. 556, [21 Pac. 971]; and results from what is said in *Kohler v. Agassiz*, 99 Cal. 9, [33 Pac. 741]. We may, therefore, consider the complaint as amended, for it in no sense changed the nature of the cause of action." (See, also, *Pinkiert v. Kornblum*, 5 Cal. App. 522, [90 Pac. 969]; *Pajaro Valley Bank v. Scurich*, 7 Cal. App. 732, [95 Pac. 911].)

No reason can be advanced for holding that the prayer to a complaint may not be amended, or supplied when omitted, in like manner and to like extent that the complaint may be amended where the facts stated are not sufficient to constitute a cause of action, or where the title of the court has been erroneously given through inadvertence or mistake, or an error has been made in naming the party or parties plaintiff. The prayer may be amended to conform to the proofs at the trial. Why may not it be amended or supplied to conform to the cause of action stated in the complaint? We are of the opinion that the complaint as it originally stood, accompanied as it was by the affidavit required by the statute, was sufficient as a basis for the writ, although in its then form, no answer having been filed, a judgment could not legally have been entered in the case. Furthermore, we think the court was authorized to grant the motion to amend the complaint, before it had ruled upon defendant's motions, by allowing a prayer for relief consonant with the cause of action set forth in the complaint. The amended complaint supersedes the original complaint (*Bray v. Lowery*, 163 Cal. 256, [124 Pac. 1004]); and it has been held that where no new cause of action is attempted to be stated, the amendment, though made after the expiration of the period of limitation for the action, relates back to the time of the commencement. (*Ruiz v. Santa Barbara Gas etc. Co.*, 164 Cal. 188, [128 Pac. 330].)

The controlling questions in the case seem to be disposed of by the foregoing considerations.

The order is affirmed.

Hart, J., and Burnett, J., concurred.

[Civ. No. 2384. First Appellate District.—May 2, 1918.]

**PETER McMANUS, Jr., as Administrator, etc., Appellant, v. RED SALMON CANNING CO. (a Corporation), Respondent.**

**NEGLIGENCE—ACTION FOR WRONGFUL DEATH—REFUSAL TO PASS ON CERTAIN ISSUES—PRESUMPTION AS TO EVIDENCE ON OTHER ISSUES.—**

In an action for wrongful death, where the court refused to pass on the issues of negligence and the amount of damages sustained, upon the assumption that plaintiff had no standing in court under a former decision, it cannot be presumed on appeal that there was no evidence on other issues or that the evidence produced was unfavorable to plaintiff.

**ID.—JURISDICTION OF ACTION.—**An action for wrongful death is governed by the law of the jurisdiction where the tort is committed, and as it is a transitory action, it may be maintained in any jurisdiction where the defendant is found, unless the court where the suit is brought, in enforcing the remedy, would be acting in conflict with the express provisions or the general policy of the law of its own jurisdiction.

**ID.—STATUTORY ACTION UNDER LAWS OF ANOTHER STATE—CONSTRUCTION.—**In considering a statutory remedy, such as an action for wrongful death, created by the law of a foreign jurisdiction, the court will adopt the construction of the statute given to it by the courts of that jurisdiction; but if the statute has never been construed in the foreign state, the court will construe it as it would a like statute of its own state.

**ID.—ACTION FOR WRONGFUL DEATH UNDER LAWS OF ALASKA—BENEFIT OF ESTATE.—**Section 1185 of the laws of Alaska, codified by authority of the act of Congress of August 12, 1912, confers a right of action for wrongful death on the personal representatives of the deceased for the benefit of the estate, and any damages recovered become assets of the estate, to be administered like other assets, and the creditors and the expenses of administration to be paid therefrom if necessary, which is contrary to the policy of the laws of the state of California.

**ID.—LATER ENACTMENT—REPEAL OF FORMER LAW IN CASES OF EMPLOYER AND EMPLOYEE.—**Section 1185 of the laws of Alaska, conferring a right of action for wrongful death on the personal representatives of the deceased for the benefit of the estate, was repealed by chapter 45 of the Sessions Laws of Alaska for 1913, as to cases between employer and employee, which provides a remedy for the wrongful death of an employee in accord with the spirit of the laws of California.



**ID.—ERRONEOUS RULING ON JURISDICTION—AMENDMENT OF COMPLAINT.—**

Where an action for damages for wrongful death brought under the laws of Alaska was disposed of on an erroneous ruling on a question of jurisdiction alone, the plaintiff, as a matter of substantial justice, should be permitted to amend to supply a necessary allegation, if possible.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

**F. R. Wall**, for Appellant.

**F. V. Keesling**, and **T. G. Crothers**, for Respondent.

**ZOOK, J., pro tem.**—This is an appeal upon the judgment-roll from a judgment for defendant in an action for the wrongful death of plaintiff's intestate, John McManus. The complaint alleges that defendant, a California corporation, hired decedent at San Francisco, as a seaman and also to do shore work for it on a voyage to Alaska; that on July 17, 1915, while decedent was working in a pile-driving crew for defendant near Naknek, Alaska, he was struck by a block that fell from defendant's pile-driver and was killed; that the accident was caused by the defendant's negligence in using a block and strap known to it to be defective; that, under two statutes of Alaska, which are pleaded at length, an action for wrongful death may be brought by the personal representative of the decedent, and that plaintiff is the administrator of decedent's estate, duly appointed by the superior court for the city and county of San Francisco; that decedent left no wife or child, but both his parents are living; and that by reason of his death "his estate" had suffered damage in the sum of \$9,999.

Defendant's demurrer having been overruled, it filed its answer and the cause went to trial on April 3, 1916, and on April 8, 1916, it filed an amended answer, which, in addition to a denial of negligence, set up a plea to the jurisdiction, based upon the original opinion of the supreme court in the case of *North Alaska Salmon Co. v. Pillsbury*, 51 Cal. Dec. 473, rendered a few days before the trial. In that opinion the supreme court held that, under the Workmen's Compensation Act, the Industrial Accident Commission had exclusive

jurisdiction to award compensation to a person, employed here to work in California and Alaska, for injuries received in the course of his employment beyond the territorial jurisdiction of California. In the case at bar the lower court, evidently assuming that this decision disposed of the whole case, made its findings of fact bringing the case within the rule of the decision, "without passing upon any of the other issues in said cause" (so the findings read), and accordingly gave judgment for defendant on the sole ground of its want of jurisdiction to try the case.

As the original holding in *North Alaska Salmon Co. v. Pillsbury*, was later reversed by the supreme court on rehearing (174 Cal. 1, [L. R. A. 1917E, 642, 162 Pac. 93]), when it was finally held that the Industrial Accident Commission was without jurisdiction to award damages for injuries received beyond the territorial jurisdiction of its state, the ruling of the lower court was admittedly erroneous, but respondent's counsel contend that the judgment should nevertheless be sustained on other grounds. Their first contention is that, as the findings support the judgment and the evidence taken on the trial is not before this court, every presumption is in favor of the judgment, and that this court cannot go into the matter of errors not appearing on the record. But, in the case at bar, the court expressly refused to pass on the issues of negligence and the amount of damages sustained, upon the assumption that plaintiff had no standing in court at all under the decision referred to, and that it would be an idle act to find on any issue other than those necessary to bring the case within the scope of that decision. Therefore it cannot be presumed that there was no evidence on the other issues, or that the evidence produced was unfavorable to plaintiff. The only reasonable inference to be drawn from the findings is that there was some such evidence, which the court, for the reasons stated, declined to consider at all.

Respondent's next contention is that plaintiff's alleged right of action for the wrongful death of his intestate, as given by the statutes of Alaska, is contrary to the policy of the law of California, and will not be enforced here. The statutes pleaded by plaintiff are section 1185 of the Compiled Laws of Alaska of 1913, codified by authority of the act of Congress of August 24, 1912, chapter 387, section 19, 37 Stat. 518, and chapter 45 of the Session Laws of the Territory of Alaska for

1913, approved April 30, 1913. Section 1185 reads as follows:

"When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former might have maintained an action, had he lived, against the latter for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not exceed ten thousand dollars, and the amount recovered, if any, shall be exclusively for the benefit of decedent's husband, wife or children, him or her surviving; and when any sum is collected it must be distributed by the plaintiff as if it were unbequeathed assets left in his hands, after payment of all debts and expenses of administration, and when he or she leaves no husband, wife or children, him or her surviving, the amount recovered shall be administered as other personal property of the deceased person; but the plaintiff may deduct therefrom the expenses of the action, to be allowed by the proper court upon notice, to be given in such manner and to such persons as the court deems proper."

Chapter 45 of the Session Laws of 1913 is entitled "An act to fix the liability of employers for personal injuries sustained by their employees," and the parts thereof material to this discussion are as follows:

"Section 1. That every person, association, or corporation engaged in the business of manufacturing . . . building or other business or occupation carried on by means of machinery or mechanical appliances shall be liable to any of its employees, or in the event of his death, to his personal representative for the benefit of his widow and children, if any, if none then for his parents, if none then for his next of kin dependent upon him for all damages which may result from the negligence of its or his or their officers, agents or employees, or by reason of any defect or insufficiency due to its or their negligence in the machinery, appliances and work. . . .

"Section 4. That no action shall be maintained under this act unless it be shown that there exist beneficiaries as provided in section 1 hereof. . . ."

It is settled law that an action for wrongful death, like other actions on tort, is governed by the law of the jurisdiction where the tort was committed, and as it is a transitory action,

it may be maintained in any jurisdiction where the defendant is found (*Ryan v. North Alaska Salmon Co.*, 153 Cal. 438, [95 Pac. 862]), unless the court where the suit is brought, in enforcing the remedy, would be acting in conflict with the express provisions or the general policy of the law of its own jurisdiction. (11 Cyc. 663.) It is also a well-established rule that, in considering a statutory remedy, such as an action for wrongful death, created by the law of a foreign jurisdiction, the court will adopt the construction of the statute given to it by the courts of that jurisdiction. (*Osborne v. Home Life Ins. Co.*, 123 Cal. 610, 612, [56 Pac. 616].) But, if the statute has never been construed in the state of its origin, the court will construe it as it would a like statute of its own state. (36 Cyc. 1104.) Examining these Alaska statutes in the light of the rules above given, we find that section 1185 has been construed by the United States circuit court of appeal for the ninth circuit, which has appellate jurisdiction in cases arising in Alaska, in the case of *Jennings v. Alaska Treadwell Gold Min. Co.*, 170 Fed. 146, [95 C. C. A. 388]. It was there held that section 1185, like the Oregon statute from which it was originally taken, confers a right of action for wrongful death on the personal representative of the decedent for the benefit of the estate, and that any damages recovered become assets of the estate, to be administered like any other assets. The creditors and the expenses of administration are to be paid out therefrom, if necessary, the balance going to the heirs, if there are any; and in default of heirs, the state takes by escheat. We fully agree with counsel for respondent that this right of action, created by section 1185, is contrary to the policy of the laws of California, for our legislature in creating the action for wrongful death, which was unknown at common law, followed the provisions of Lord Campbell's Act, adopted by parliament in 1846, and our courts have adopted the construction given that act in Great Britain and in those states which have similar laws, namely: That the action for wrongful death has been created for the benefit of those relatives of the decedent who have the right to look to him for aid and support, and that the damages to be given are limited to the actual pecuniary loss suffered by those relatives by being deprived of such aid.

Therefore, if appellant's right of action rested on section 1185 alone, we would be compelled to hold that the action

could not be maintained, for it would not be in accord with the policy of our laws to make a resident of our state pay damages for the death of decedent where no one was shown to have suffered any pecuniary loss thereby. But the second statute pleaded, chapter 45 of the Session Laws of Alaska for 1913, which is a later enactment than section 1185, presents the matter in an entirely different light. Section 1 of that act gives the right of action against the employer for wrongful death of an employee to his personal representative "for the benefit of his widow and children, if any, if none for his parents, if none then for his next of kin *dependent* upon him," and section 4 provides that the action shall not be maintained unless it be shown that there are beneficiaries such as are described in the clause just quoted. We are satisfied that this act in effect repeals the provisions of section 1185 in so far as cases between employer and employee are concerned, and provides a remedy for the wrongful death of an employee which is in full accord with the spirit of our law. The language quoted is almost identical with that used in section 1970 of our Civil Code, which provides that the action may be maintained "for the benefit of the widow, children, dependent parents, and dependent brothers and sisters, in order of precedence as herein stated," and the objectionable features of section 1185 are therefore eliminated from the later act. As this later statute has never been construed in any Alaska case, so far as we have been able to ascertain from an examination of all of the cases reported in the Federal Reporter since its passage, and as its provisions so closely resemble our own statutes on the subject, it is our duty to construe it as we do our own statute, as an act for the compensation of dependents. We therefore feel that appellant should be given an opportunity to present his case on the merits on a new trial, provided that he can show that the parents of decedent on whose behalf the action was brought were in fact dependent upon him for support and suffered pecuniary loss as a result of his death. We appreciate that there was no allegation of the parents' dependency in the complaint, but in view of the fact that the defendant's demurrer was overruled, and the case went to trial and was disposed of on an erroneous ruling on a question of jurisdiction alone, we think that as a matter of substantial justice plaintiff should be permitted to amend to supply this allegation, if he can do so.

It is ordered that the judgment be reversed, and the cause remanded for further proceedings in accordance with this opinion.

Kerrigan, J., and Beasley, J., *pro tem.*, concurred.

---

[Civ. No. 2262. Second Appellate District.—May 2, 1918.]

F. D. COLLINS, Respondent, v. R. O. BELLAND, Appellant.

**COSTS—WAIVER OF FINDINGS—RUNNING OF TIME OF SERVICE AND FILING.**—Where findings of fact are waived, an entry on the minutes of the court directing judgment for one or the other of the parties constitutes the decision of the court, and the time for serving and filing memorandum of costs commences to run from the minute entry date, or the date of notice, to the party claiming costs, of such minute entry.

APPEAL from an order of the Superior Court of Los Angeles County striking out a cost bill. Frank G. Finlayson, Judge.

The facts are stated in the opinion of the court.

Waldo, Root & Dysert, and Floyd Anderson, for Appellant.

A. P. Michael Narlian, for Respondent.

JAMES, J.—The defendant, being the successful party at the trial had herein, appeals from an order of the superior court striking out the cost bill filed by him. The ground of the motion to strike out the bill was that it had been filed before decision had been made by the court. It is shown by the minutes of the superior court that trial of this action was had on July 20, 1916. The concluding portions of the minutes of the court are as follows: "Cause submitted without argument. Thereupon it is ordered that judgment be ordered for defendant. Findings were waived." It is made further to appear by the record that on the day following the defendant served and filed his memorandum of costs and disbursements. It further appears that on the twenty-sixth day of

July a form of judgment was presented to the judge, who signed the same, and the clerk filed and entered the judgment so made, leaving blank that portion of it which provided for the recovery of costs to the defendant. On the twenty-seventh day of July, five days having elapsed after the filing and serving of the memorandum of costs, and no objections having been made thereto, the clerk filled in the blank, inserting the total of defendant's costs as shown by his memorandum. The sole question presented is as to whether the entry on the minutes of the court, findings being waived, directing judgment for the defendant, constituted a decision of the court in the case. Section 1033 of the Code of Civil Procedure provides that the party in whose favor judgment is rendered, and who claims his costs, must deliver to the clerk and serve upon the adverse party, within five days "after the verdict, or notice of the decision of the court or referee," a memorandum of the items of his costs and disbursements. The section in conclusion provides: "By the decision of the court, or referee, herein referred to, is meant the signing and filing of the findings of fact and conclusions of law." No question is made but that the plaintiff had actual notice and legal notice of the making of the minute order directing judgment for the defendant. The question is: Under section 1033 of the Code of Civil Procedure, which provides that the memorandum of costs and disbursements must be filed within five days after the signing and filing of findings of fact and conclusions of law, does the time for the filing of such memorandum, where no findings of fact are made, commence to run before the entering of judgment? If it may be said that there is no decision in such a case until the judgment has been entered, then the position of respondent must be sustained. If, on the other hand, where findings of fact and conclusions of law are waived, a minute entry directing judgment for one or the other of the parties constitutes the decision, then the time for the serving and filing of the memorandum of costs would commence from the minute entry date or the date of notice to the party claiming costs, of such minute entry. In *Crim. v. Kessing*, 89 Cal. 478, [23 Am. St. Rep. 491, 26 Pac. 1074], it is said: "But under the provisions of the Code of Civil Procedure, whenever findings are required, there can be no 'rendition of the judgment' until they are made and filed with the clerk. Findings of fact, however, are required only 'upon the trial of a

question of fact,' and they may in all instances be waived. Whenever they are waived or are not required, the entry of its decision in the minutes of the court constitutes the 'rendition of the judgment' in the same manner as it did under the former system." And in *San Joaquin L. & W. Co. v. West*, 99 Cal. 345, [33 Pac. 928], it is said: "The decision of the court referred to in these sections, when filed, amounts in law to a rendition of the judgment." We think that where the findings of fact are waived, as they were in this case, an entry on the minutes of the court directing judgment for one or the other of the parties constitutes the decision of the court. The opinions which hold that the oral views of the court as expressed from the bench do not constitute a decision in any case are not in point.

The order appealed from is reversed.

Conrey, P. J., and Works, J., *pro tem.*, concurred.

---

[Civ. No. 2223. First Appellate District.—May 3, 1918.]

**WILLIAM VAN HAGEN, Respondent, v. FIRST STATE BANK OF CLOVIS (a Corporation), Appellant.**

**PROMISSORY NOTE—PLEDGE—WRONGFUL RETENTION—ACTION FOR VALUE—EVIDENCE.**—In an action to recover the reasonable value of a collateral note wrongfully retained, the plaintiff cannot recover where the evidence shows an agreement that the defendant was to hold the note until plaintiff's principal note was paid, and that the payment had not been made.

**APPEAL** from a judgment of the Superior Court of Fresno County. George E. Church, Judge.

The facts are stated in the opinion of the court.

Ernest Klette, M. B. Harris, and E. M. Harris, for Appellant.

Kitt Gould, and C. K. Bonestell, for Respondent.

**KERRIGAN, J.**—This is an action to recover the sum of \$1,080, alleged to be the reasonable value of a certain promis-



sory note owned by plaintiff and wrongfully retained by defendant.

The case was tried before a jury. At the conclusion of the testimony there was an instructed verdict for plaintiff for the sum claimed. Defendant moved for a new trial, and in support of the motion specified, among other things, the insufficiency of the evidence to justify the verdict, and assigned as error certain rulings of the court. This motion was denied, and defendant appeals from the order and from the verdict and judgment.

From the evidence it appears that a Mrs. Amer and one Cadwallader were indebted on a joint note executed by them to the State Bank of Clovis in an amount approximating one thousand one hundred dollars. Mrs. Amer was desirous of taking this note up, and induced Van Hagen, the plaintiff herein, to assist her in so doing. In October, 1914, they went together to the defendant bank, and there met a Mr. Norrish, its president and manager, to whom they stated their business. It cannot be clearly ascertained from the testimony of Mrs. Amer and the plaintiff Van Hagen what arrangement was made between the parties, but it does appear from the testimony of Norrish that he received and accepted a certificate of deposit for the sum of five hundred dollars from Van Hagen, which sum was credited on the Amer and Cadwallader note. It further appears that Van Hagen at this time executed his promissory note in favor of the bank for the sum of six hundred dollars. This note was unsecured, and Norrish insisted that some collateral be furnished to insure its payment. Van Hagen at that time was the owner of a note for one thousand dollars, referred to in the evidence as the Kepley note, and which note is the subject of this action, and he indorsed this note over to the defendant bank as security for the payment of his unsecured note to the bank for six hundred dollars. Norrish took the Kepley note, retained the Amer and Cadwallader note and also the note of Van Hagen, and informed the parties that the Amer and Cadwallader note would be delivered up when the Van Hagen note was paid. The matter remained in this unsettled condition for over two years until the filing of this action on November 17, 1916.

Upon this evidence the trial court directed a verdict for the plaintiff upon the ground that when plaintiff made the five hundred dollar payment and executed his note for six hun-

dred dollars, secured by the Kepley note, the bank had agreed to deliver up the Amer and Cadwallader note, and not having done so, that the consideration for the Van Hagen note of six hundred dollars had failed, and no recovery could be had thereon, and this being so, plaintiff was entitled to a return of the Kepley note given to secure its payment.

The evidence does not support this conclusion. The undisputed testimony of Norrish (and it is the only testimony on the subject) is that he was to retain all of the notes until such time as plaintiff's note was paid. Defendant undertook to make some explanation of the transaction and to show that Van Hagen had received consideration for the payment by him of the five hundred dollars and the execution by him to the bank of his note, and that he had relinquished his interest in the Kepley note. This evidence was rejected by the trial court. Defendant clearly had the right to prove this fact.

Defendant further offered in evidence the record in an action entitled "Van Hagen v. Amer," from which record it appears that plaintiff had secured a judgment foreclosing a mortgage executed by Mrs. Amer to secure a note given to Van Hagen in settlement with him; and in making the offer attorney for defendant attempted to state that his purpose in making it was to show that Van Hagen had received full and complete satisfaction of his claim. This statement was rejected, but the judgment-roll was admitted. A reading of the testimony discloses the fact that all the circumstances surrounding the transaction in this case are not in evidence. No recovery is sought for the five hundred dollars paid by plaintiff. There is also evidence to show that when demand was made upon Norrish for the Kepley note he stated that he was holding it for the benefit of Cadwallader until such time as the Van Hagen note was paid. The evidence as a whole is very unsatisfactory and not convincing, but there is nothing contained therein to contradict the statement of Norrish that the agreement between the parties was that he was to hold all of the notes until plaintiff's note was paid. The note not having been paid, plaintiff was not entitled to recover the Kepley note nor its value.

No question is raised as to the sufficiency of the pleadings herein.

Assuming that plaintiff's complaint is an appropriate one, it simply declares upon a common count for goods sold and delivered by plaintiff to defendant in the sum of \$1,080, which it is alleged is the reasonable value of the property, namely, the note, describing it. The value of the note is denied by defendant. The evidence is silent as to whether or not the note had any value. Aside from this, the undisputed evidence shows that the bank was to retain the note in question until the Van Hagen note was paid. This being so, there is no evidence to support the judgment.

For the reasons given the judgment is reversed.

Beasley, J., *pro tem.*, and Zook, J., *pro tem.*, concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on June 1, 1918.

---

[Civ. No. 1799. Third Appellate District.—May 8, 1918.]

E. L. MEYERS, Respondent, v. JOHN McKILLOP,  
Appellant.

**ACTION FOR SERVICES—CONTRACT OF EMPLOYMENT—LIABILITY OF DEFENDANT—SUFFICIENCY OF EVIDENCE.**—In this action for services of a physician rendered to a third party, it is held to be a fair inference from the testimony that the services were performed upon the reliance that the defendant would pay therefor, and that the latter directly promised to make such payment.

**ID.—ORIGINAL CONTRACT—SUFFICIENCY OF CONSIDERATION.**—Where services were performed for the benefit of a third party in reliance that defendant would pay therefor, and defendant directly promised to pay, an original contract was thereby constituted with a sufficient consideration for its support.

**APPEAL** from a judgment of the Superior Court of Butte County. H. D. Gregory, Judge.

The facts are stated in the opinion of the court.

George F. Jones, for Appellant.

Lon Bond, and Dierup & Dierup, for Respondent.

BURNETT, J.—The action was for the recovery of the sum of \$390.25 for services rendered by plaintiff as physician and surgeon and by his assignees, W. B. Johnson and Sacramento Valley Hospital (a corporation), and the judgment was in his favor for \$359.25.

The only question in this case is whether the evidence warranted the court in finding that the transaction between plaintiff and defendant created an original or primary obligation on the part of the latter, it being his contention that he was, at most, a guarantor, and that the obligation was void because not in writing. The facts are similar and the same question is presented in the matter of the two small assigned claims.

We think that there can be no doubt that the theory adopted by the trial court finds sufficient support in the record. The services were performed for one F. J. Williams, and Dr. Meyers was called to attend him on the fifth day of October. Two days thereafter, according to plaintiff's testimony, he had the following conversation with the defendant at the Sacramento Valley Hospital: "I asked him whether he would pay Mr. Williams' bill. I told him I had an understanding he was going to pay the bill and he said he would. I told him perhaps we had better make the sister feel more easy about the money. When we went downstairs, I repeated the conversation in front of Sister Marie and the substance was that he was to pay Mr. Williams' bill."

He furthermore testified: "I made three calls on the 7th; on the 8th three calls; on the 9th there were five calls made; and on the 10th he was operated on by myself, Dr. Johnson and Dr. Wilson. I called on him twice subsequent to the operation; on the 11th I called three times; on the 12th I called four times; and on the 13th three times the day he died."

These services performed after his conversation with defendant were reasonably worth, so he said, the sum of \$305, and this was allowed by the court.

It is a fair inference from the foregoing that these services were performed upon the reliance that the defendant would pay, and it is also a fair inference that the latter directly promised to make such payment. This constitutes an original contract with a sufficient consideration for its support: (*Klamath Lumber Co. v. Co-operative Land & Trust Co.*, 25 Cal. App. 678, [145 Pac. 159].)

It is true that Dr. Meyers was originally called by one Barnholdt, but there is no evidence that he was employed by the latter or by Williams or that he looked to either for his compensation. At any rate, we may eliminate the services performed on the 5th and 6th of October, as did the trial judge, and consider only what was done after said conversation with the defendant. This may be considered a separate and distinct contract, and we see no legal obstacle in the way of enforcing it. It is true that the defendant denied any agreement for the payment of the claim, but the court below obviously did not believe him, and we cannot say that the want of faith was not justified.

There is some contention in the closing brief that it does not appear whether the findings cover the entire period of the service or the time subsequent to plaintiff's employment by the defendant. The particular finding in point follows the allegation of the complaint:

"That within two years last past plaintiff within the county of Butte, state of California, rendered medical and surgical services to one F. J. Williams at the special instance and request of the defendant, and defendant promised and agreed to pay the value thereof."

Of course, from this it could not be determined whether it covered the entire period or not, but the allegation in the complaint was certain and definite enough to withstand the general demurrer which was interposed, and the exact time covered by the services for which defendant was held liable was revealed by the evidence. The amount found due corresponded exactly with the testimony as to the value of these services, and we are not inclined to the view that there is any merit in this claim of the appellant.

Indeed, the case is simple and there seems no necessity for any further consideration.

The judgment is affirmed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 1808. Third Appellate District.—May 3, 1918.]

**VENTURA MANUFACTURING AND IMPLEMENT COMPANY, Appellant, v. G. A. WARFIELD, Respondent.**

**SALE—ACTION FOR PRICE OF ENGINE—BREACH OF WARRANTY—SUFFICIENCY OF EVIDENCE.**—In this action on a note for the balance of the price of a tractor engine, it is held that the evidence supports the findings that the engine never at any time measured up to the warranted test, that the defendant never at any time unconditionally accepted it, and that the whole transaction was subject of controversy founded on repeated complaints.

**ID.—BREACH OF WARRANTY—QUESTION FOR JURY.**—In an action on a note for the balance of the price of a tractor engine, the question of breach of warranty, where the findings are conflicting, is for the jury.

**ID.—NOTICE OF DEFECTS—WAIVER.**—The requirement in a contract for the sale of a tractor engine that notice of the failure of the engine to work properly must be given within a specified time is waived by the continued and persistent efforts of the agents of the seller, including the one who made the sale, to make the machine work, after the expiration of the time limited.

**ID.—AUTHORITY OF SALE'S AGENT.**—Authority of an agent who makes a sale of a tractor engine extends to all such acts as are properly connected with the sale and delivery of the machine, and does not stop when the proposed vendee first takes the machine on trial, but continues until the sale is completed or the machine returned.

**ID.—KNOWLEDGE OF DEFECTS—WAIVER OF NOTICE.**—The provision in a contract of sale of a tractor engine that the purchaser shall give written notice to the seller of any defects, and that failure so to do shall constitute a waiver of breach of warranty, is waived where the agent who made the sale is present at the trial of the machine, and thus has knowledge of failure of performance.

**ID.—ACTION FOR PRICE OF ENGINE—OMISSION TO PLEAD—WAIVER—TRIAL.**—In an action on a note for the balance of the price of a tractor engine, although the defendant did not specially plead waiver of condition in the warranty as to the time for trying out the machine, the case was not tried erroneously on the theory of such waiver where the answer and cross-complaint set out all the facts of the transaction.

**APPEAL** from a judgment of the Superior Court of Glenn County. Wm. M. Finch, Judge.

The facts are stated in the opinion of the court.

George R. Freeman, W. H. Barnes, and Orr & Orr, for Appellant.

Duard F. Geis, and B. A. Herrington, for Respondent.

HART, J.—Plaintiff commenced the action to recover the sum of \$1,967.50, and interest thereon, due on a promissory note, dated September 24, 1912, in favor of plaintiff and signed by defendant. In this note it was set forth that it was given in consideration of the sale by plaintiff to defendant of a "30 H. P. Pioneer Engine."

The case was tried before a jury and judgment was entered in accordance with their verdict, as follows: That defendant was entitled to recover from the plaintiff the sum of one thousand five hundred dollars, paid by him on account of the purchase of the engine, together with interest thereon; that defendant was entitled to have said promissory note surrendered and canceled as though fully paid; and that plaintiff is entitled to the possession of said tractor. From said judgment plaintiff appeals.

The defendant interposed an answer to the complaint and also filed a cross-complaint and set up a counterclaim. The defendant by answer denies the vital averments of the complaint and sets up an affirmative defense, based upon alleged false representations by the plaintiff with respect to the character of the engine for capacity and durability, and relies upon the alleged violation by plaintiff of the terms of the written warranty attached to and a part of the contract of sale. The cross-complaint repeats the allegations of the answer respecting the alleged false representations by the plaintiff and charges that solely by the representations so made the defendant was induced to enter into the contract for the purchase of the tractor; charges that the engine which was delivered to the defendant by the plaintiff was not the engine which he agreed to buy and which the plaintiff agreed to deliver to him; alleges that the plaintiff violated the terms of its warranty and that, upon learning of the difference in the engine delivered and the engine which he purchased and the plaintiff promised to provide him with, and of the defects of the engine delivered, the defendant immediately notified plaintiff thereof and rescinded the contract, and demanded of the plaintiff a return of the cash money paid on account of the sale and the cancella-

tion of the note given by him to the plaintiff for the balance of the purchase price.

The foregoing, while only a brief statement of the allegations of the pleadings filed by the defendant, is sufficient for present purposes and to show the general issues upon which the cause was tried and upon which it is submitted here by this appeal.

The facts are briefly these: Some time in the month of May, 1912, one C. W. Horstman, a salesman for plaintiff, solicited defendant to purchase a tractor and exhibited to him certain pamphlets and catalogues describing gas engines and also photographs thereof. The negotiations led to an agreement by the defendant, on the twenty-second day of June, 1912, to purchase a certain engine, a description and a photograph of which were contained in the pamphlets and catalogues referred to. Thereupon, and on the day named, the following order or agreement was signed by the defendant and delivered to plaintiff through its salesman, Horstman:

“Order for Gas and Gasoline Engine:

“To Ventura Mfg. and Imp. Co. Town Ventura, State Calif.

“The undersigned of Princeton Post Office, County of Colusa, State of Calif. Rural Route No. — hereby purchases of you, subject to all conditions of agreement and warranty printed on back of this order and made a part hereof, to be shipped to G. A. Warfield Ranch, Marysville, Calif.— ‘One 30 H. P. Pioneer’—Pioneer Tractor gas or gasoline engine (reg. size of pulley), complete including necessary fixtures, and to settle for said engine by payment of (3467.50) thirty-four hundred sixty-seven 50-100 Dollars as follows: Fifteen hundred Cash on delivery of engine, Nineteen hundred sixty-seven 50-100 note due Nov. 15, 1912. It is expressly agreed that this order shall not be countermanded, and that said engine shall remain and be held by the undersigned as your exclusive property until purchase money shall have been paid in full. It is expressly agreed that the engine shall be and remain personal property in what so ever manner it may be annexed to realty.

“Dated the 22nd day of June, 1912.

“Sold by C. W. Horstman.

“Signed: G. A. WARFIELD.”



At one end of said order is written: "Note to bear interest at seven per cent after maturity. Tractor to have 60 gal. radiator and extension and swinging hitch."

The warranty is in the following language:

"Pioneer Tractor Co. (Incorporated) warrants the within described engine to do good work, to be well made, of good materials, and durable if used with the proper care. If upon trial, with proper care, the engine fails to work well, the purchaser shall immediately give written notice to Pioneer Tractor Co., Winona, and to the agent from whom it was purchased, stating wherein the engine fails, shall allow a reasonable time for a competent man to be sent to put it in order, and render friendly assistance to operate it. If the engine cannot then be made to work well, the purchaser shall immediately return it to said agent, and the price paid shall be refunded which shall constitute a settlement in full of the transaction.

"Use of the engine after three days, or failure to give written notice to said Company and its agent, or failure to return the engine as above specified, shall operate as an acceptance of it and a fulfillment of this warranty. No agent has power to change the contract of warranty in any respect and the within order can be canceled only in writing from said Company's Winona Office.

"This express warranty excludes all implied warranties and said Company shall in no event be liable for breach of warranty in an amount exceeding the purchase price of the engine. If within ninety days' time any part proves defective, a new part will be furnished on receipt of part showing defect."

On the second day of September, 1912, a tractor was delivered to the defendant at his ranch by Horstman. This, as the defendant testified, was after the harvesting season had ended, and when there was practically no opportunity for testing out the tractor as fully as was desirable and necessary.

There is, in point of fact, no dispute as to the proposition that there were material differences in mechanical construction between the engine purchased by the defendant and which the plaintiff agreed to furnish him with and the engine actually delivered. But, for the purpose not only of showing the differences referred to but that from the time, approximately, that the engine was received by the defendant, he was dis-

satisfied therewith and protested, as he continued thereafter to protest, against accepting the tractor upon the ground that it was not the machine he had bargained for, we will here present a brief statement of his testimony with regard to the transaction, as follows: He stated that the engine delivered was not the character of engine ordered by him as represented by the diagram and catalogue exhibited to him by Horstman; that the radiator held twenty-four and one-half gallons of water instead of sixty; that the engine delivered had no muffler over the exhaust-pipes, there being nothing "to protect ripe grain from being burned from the cinders from the exhaust. The sparks shot from the exhaust free and clear. The main oiling system in the main pump was supposed to be in the cab, in front of the operator of the engine, in plain sight at all times, and upon examination I found this oiler was down under the hood, alongside of the cylinders and in grease where it was impossible to see it without stopping the engine, raising up the hood, and wiping off the grease, and using some artificial light to see if the oil was running. In the engine ordered this particular oil was to be in the cab in sight of the operator at all times, so that he could know that the main bearings were getting oil at all times. . . . The gears were supposed to be entirely inclosed in a case to exclude all dust from getting in the oil and among the gears, and upon examination I found there was an opening alongside of the gears on both sides, under the hood, where the dust from the fan, driving past the cylinders, would finally end up in this case where these gears revolved, and did not give any protection to speak of from any dust flying at all; the fan drove the dust back to the gears. . . . This was represented not to be the case in the engine ordered—that they were to be inclosed, all incased, and to be protected entirely from the dust. . . . the engine was to have a Kingston carbureter and on examination we found there was a Bennett carbureter. . . . The fan for cooling air was to be a gear-driven fan, was not to have any belts at all, but to connect direct with the engine and drive with gears. It was described in the catalogue as a direct, gear-driven fan, and when the engine arrived it was found to have a bolt drive with spring tightener. . . . There was an apparent defect in the wheels. The spokes were loose in the rim."

Accompanying Horstman, when the engine was delivered to defendant, was a Mr. Muir, an expert sent by the Pioneer

Tractor Company, to demonstrate it. On the next day, Muir, driving the tractor, took it out into a field with some plows and operated it for two hours or more and it was then placed in a shed on defendant's premises. At the time of the delivery to defendant he called the attention of Horstman to the differences between the engine he received and the one he expected to receive. As to the radiator, Horstman stated that he was confident it would keep the engine cool but that "if it didn't they would put on a larger radiator. . . . He said the only way to find out was to try it out in harvest." The witness stated: "I told him I didn't want it the way it was. It was not the engine I had picked out on the catalogue and I didn't think it would work at all and I wouldn't take it under those conditions. . . . They put it in the shed on the ranch and left it there."

There is evidence that Horstman and the plaintiff attempted to reason with defendant and show him that by proper handling the tractor would do the work and so come up to the warranted test as to capacity and durability, and that thus the defendant was persuaded to give it a further trial. Accordingly, on the twenty-fourth day of September, 1912, defendant made a cash payment of one thousand five hundred dollars and executed and delivered to Horstman the note sued upon, it being made payable on August 1, 1913, which would be after the harvest season of 1913. After the trial made by Muir in the early part of September, no attempt was made to use the tractor until November, when defendant took it out for the purpose of plowing. He testified: "After I got the engine started I had difficulty in keeping it running. The ignition did not seem to work well, and the fan gave me considerable trouble. . . . The shift gears would not work well. I worked with it several days, plowing, or trying to plow, and finally parts of it began to go to pieces. The fans broke. I had to go down and get a fan-belt in town, and the magneto went out of commission entirely from no cause that I could see, and I took the magneto down to San Francisco and got another one; then I got an engineer to help me on the engine and the two of us worked with it and fought it, and we got the engine finally to go a little piece. . . . Then the engine broke down. . . . It took me a week to plow a piece that should have been plowed in two days. The fan-belt proposition went to pieces, the fan-belt and the bearings that run this shaft. . . . We

took those to Colusa and had them re-babbitted. . . . Then the wheels began to develop defective; the spokes were loose and that caused a crystallization in the rim and each spoke in the rim split out clear from the spoke to the outside of the rim, and when we brought the engine in it had something like twenty-four or twenty-five cracks across the rim. . . . We took it back to the shed and on the way home the fan-belt and gears went all to pieces." Some rims were shipped to him by plaintiff and were put on the tractor by a man representing plaintiff, who also re-babbitted the bearings on the fan shaft.

In November, 1913, defendant attempted to harrow with the tractor, but there was a recurrence of the troubles he had theretofore had—the spokes getting loose, making it necessary to get new ones, the connecting rods not staying tight, the fan-belt breaking, the shift gears giving trouble, the engine heating and the magneto giving trouble so that he ran on the battery. He finished his harrowing with mules and put the tractor back in the shed. On the 14th of May, 1914, he started to do some grading and on the way to the field with the tractor the clutch broke; he sent to plaintiff for a new disk, which came on May 25th. He still had trouble with the engine, and, after doing about one-third of the grading, he discontinued the work. In June he hired an engineer and they worked ten or fifteen days on the engine and he then hired another engineer to inspect it. They commenced harvesting and, on the third day, "everything went to pieces, and we opened it up and the crank shaft and connecting rods and everything were in a pile." He telegraphed plaintiff for another crank shaft, which came to him after a long delay and after he had tried to have the old one welded in Sacramento. He hired an expert mechanic to set the crank shaft and the engine was put back "in practically as good condition as it could be put." The next day the engine commenced to heat and sometimes two-thirds of the day was lost waiting for the engine to get cool. The harvesting, which lasted from June 9th to July 23d, was not successful, the witness stating that he probably lost half of each day on account of the engine. Then defendant tried to use the engine for pumping water for irrigating an orchard, but could not keep it cool, and after two or three days he took it back to the shed. On the way there, while running on a county road, the front axle broke. He had this repaired and then placed the tractor in the same place in the

shed where it had been left by Horstman at the time of its delivery to defendant.

Expert testimony introduced by defendant tended to show that the construction of the engine was not proper in certain specified particulars, and the engineer sent by plaintiff to work on the tractor stated, on cross-examination, that "it was essential that the fan construction should be improved and changed to make it of any practical value," and that the mechanical construction of the engine should be changed.

Certain correspondence was introduced in evidence. The first letter in the record is dated Ventura, November 20, 1912, written by plaintiff to defendant, and refers to a letter theretofore received from defendant in regard to "spikes for wheels."

On December 26, 1912, defendant wrote plaintiff as follows: "The engine [Pioneer 30] which I purchased from you by contract has proved to be far from satisfactory, and along with that your company, through Mr. Charles Horstman, have misrepresented things to me. The engine is not built for the work intended or for any durability. It is now out of commission. I have asked you people to send your mechanic, but no answer; have asked you to send extras from your shops at Ventura, instead I am compelled to pay express on extras from Ind., not getting what I asked for, have to have the extras made here at the foundry or any other place at a great expense. Therefore, according to our agreement the engine is yours. I hereby cancel the payment of the note given you in payment of the engine. I ask you to send your representative here and inspect the engine, and you will find what I tell you is the truth. The engine is at your disposal. I am stuck with a contract which your engine should do but is unable to finish."

Plaintiff replied to the above letter, stating: "We feel confident your trouble lies in the fact that you do not know how to take care of the engine properly. If you had the right kind of an engineer on the machine, there would be nothing wrong with it." It was further stated that Mr. Horstman would call upon defendant.

On January 8, 1913, Horstman wrote to defendant: "Have sent off several wires yesterday to get some definite line-up from the Pioneer people with regard to their decision in the broken engine wheels."

The following letter, dated January 10, 1913, was sent to defendant by plaintiff: "We are in receipt of a letter from our Mr. Horstman stating that the wheels on the engine we sold you have cracked in several places. We at once took this matter up with the factory, advising them of the condition of the wheels, etc., and informed them that they would have to make these wheels good. The reply we received from them was that the breaking of the wheels was due to the carelessness of the engineer in not keeping the turn buckles or spokes tight, they also stated that they would furnish some extra heavy rims for this engine free of charge. . . . Mr. Horstman also reports that the other troubles you had on the engine did not amount to anything, as on all gasoline engines you may expect more or less minor troubles. . . ."

The defendant, on March 8, 1913, wrote to plaintiff a long letter, calling attention to alleged representations by Horstman regarding the engine, recapitulating particulars in which it had proven defective, and demanding the return of the one thousand five hundred dollars paid by him and the cancellation of the note.

On March 27th, the plaintiff replied to the above letter, stating, among other things: "When you signed the note, this was an acceptance of the engine. As for the note, it is out of our possession. You will take particular notice of the warranty on the back of the contract, which stated that 'no agent has the power to change the contract of warranty in any respect.' . . . We are well satisfied it is no fault of the engine that it was in the condition it was in."

Other correspondence followed, showing that defendant had gone to Ventura to endeavor to effect some sort of settlement, and, on September 9, 1913, defendant wrote to plaintiff again demanding the return of the money paid by him and the note, "or deliver to me an engine of equal value that will do the work fully guaranteed to my satisfaction."

The defendant explained, and the written correspondence above referred to corroborated him in that particular, that he made repeated trials of the tractor upon the solicitation and persuasion of Horstman, after in the first instance and the several times thereafter, he notified Horstman and the plaintiff that the machine was not the one which the latter agreed to deliver to him and that the one delivered had failed, after the several trials, to meet the warranted test.

Appellant relies upon the terms of the written warranty, denies that Horstman agreed that defendant might make a trial of the engine, but insists that if he did do so his agency was not proven and that the contract itself expressly provides that no agent shall modify its terms.

First, it is proper to observe that the transaction out of which this controversy arises was wholly between the plaintiff and the defendant, and that the assumption by the plaintiff, in its argument of the points submitted in support of this appeal, that the transaction was one between the Pioneer Tractor Company, the manufacturer of the tractor in question and defendant, cannot be maintained. By this statement we mean to say that the verdict, which is amply supported, is conclusive upon that question. The order or agreement is addressed to the plaintiff and the initial language thereof is: "The undersigned [defendant] . . . hereby purchases of you, subject to all conditions of agreement and warranty printed on back of this order and made a part hereof . . . 'one 30 H. P. Pioneer Tractor gas or gasoline engine.' " The agreement or order further provides that "said engine shall remain and be held by the undersigned [defendant] as your [plaintiff's] exclusive property until the purchase money shall have been paid." The evidence further shows that the transaction, so far as the seller was concerned, was from its beginning to and including the time at which this action was instituted, wholly and solely, and without any interposition whatever by the Pioneer Tractor Company, conducted by the plaintiff. Moreover, the promissory note executed by the defendant for the balance of the purchase price after a cash payment by the defendant of one thousand five hundred dollars had been made was made to and in favor of, and in the name of, the plaintiff. Furthermore, the note declared upon itself states that the consideration therefor is "that the said Ventura Manufacturing and Implement Company has agreed and promised that upon payment of said note, principal and interest, at maturity, . . . they will sell and transfer to the undersigned [defendant], at the price of said principal and interest, the thirty H. P. Pioneer Tractor which the said Ventura Manufacturing and Implement Company has this day intrusted to the care of the undersigned." Again, the note reads: "It is admitted and agreed that the said property so intrusted is the property of the said Ventura Manufacturing and Implement

Company, and shall remain in them until they shall make the aforesaid sale and transfer," etc.

But the contention is vigorously pressed that, assuming that the transaction was between the plaintiff and the defendant, there is no evidence showing that Horstman gave the defendant the right of any further trial of the engine for the purpose of testing its efficiency for the purposes for which it was intended and bought by the defendant than was expressly provided for in the warranty. It is further contended that, even if it had been made to appear that Horstman did allow the defendant such further trial of the engine, there is no evidence showing that he had authority to do so, and that, therefore, in doing so he exceeded his authority as agent and violated the provision of the warranty that "no agent has the power to change the contract of warranty in any respect, and the written order can be canceled only in writing from said Company's Winona office."

The theory upon which the defendant sought to present the case at the trial in the court below was that, the tractor delivered not being the one which the plaintiff agreed to deliver to the defendant, the negotiations between Horstman and the defendant as to the tractor delivered constituted a new contract, and that oral testimony disclosing the terms and conditions of such contract was necessary and proper. The trial court held that the defendant's pleadings failed to set up a new contract, but relied upon the original order and warranty, and, therefore, excluded testimony of a new contract. But we do not regard this as important in this case. The testimony, we think, very clearly shows: 1. That Horstman had the authority, as the plaintiff's sales agent, to give the defendant further opportunity to try out the engine; 2. That he did do so; 3. That the tractor delivered to the defendant failed to do the work for which such a machine is intended; 4. That it must be held that, under all the circumstances of the case, the defendant duly notified the plaintiff that the tractor was a failure and would not satisfactorily perform the work for which it was intended.

The third proposition above stated is, we think, abundantly supported by the evidence, to some of which we have specially referred above. We need not, therefore, reproduce herein upon that question further or other testimony of which there is an abundance.



That Horstman was a sales agent of the plaintiff and as such authorized to negotiate a sale of the tractor to the defendant is not disputed, but, in fact, admitted; and, under the state of this record, the verdict of the jury is conclusive upon the question of the extent of his authority in the negotiation of the transaction involved herein. In other words, the credibility of witnesses or the weight to be attached to the testimony being entirely a question for the jury, we may, therefore, accept the bare record as conclusive upon all questions of fact upon which there is therein testimony not inherently untruthful or improbable; and so viewing the record before us, we have found no reason for saying that the jury were not amply justified in finding, as from the verdict we must presume that they did find, that everything that Horstman did and said with respect to this transaction, from the time he procured from the defendant the order of June 22, 1912, for the tractor, until the defendant finally notified the plaintiff of his rescission of the contract and returned the machine to the place where the plaintiff delivered it, was done for the purpose of consummating an uncompleted sale of the tractor.

We may, however, refer to some of the testimony which tends strongly to show that Horstman had authority to make any arrangements with defendant that his judgment might dictate. Although the written order for the tractor was executed by the defendant and delivered by him to the plaintiff on June 22, 1912, the tractor was not delivered until the month of September of that year, which was after the end of the harvest season and at a time when a proper test of the engine could not well be made. The cash payment was made and the note for the balance of the purchase price given at the time of the delivery of the engine; and, although the written order of June 22d expressly provided that the note should be made payable on November 15, 1912, the said note, upon the consent of Horstman, was made payable August 1, 1913, which, as is obvious, was at a time of the year when the harvesting season was well near an end. The plaintiff accepted the cash payment and the note. The extension of the time of payment of the note beyond the harvesting season of 1912, and the acceptance by the plaintiff of the new arrangement made by Horstman are circumstances which tend in some degree to show that Horstman had general authority as a sales agent of the plaintiff, and to show further that he not only

time for a trial of the tractor by the defendant, but that, as the plaintiff's agent, he had full authority to do so. But there is other testimony warranting the conclusion that Horstman, although only an agent for a special purpose, had general authority as such agent and was authorized to do all that was in his judgment required to consummate a sale of the machine to the defendant. We need not present herein an extended statement of said testimony. It is enough to say that, as seen, it was shown that, because the engine was not the one which the plaintiff agreed to deliver—that is, it was in many important particulars different in mechanical construction from the one agreed to be delivered—the defendant objected to accepting it; that Horstman, after some reasoning with the defendant, persuaded the latter to give it a trial to see if it would not do the work which it was represented the engine bargained for would do; that, prior to the month of December, 1912, the defendant did give it a trial, and that it failed to meet the test or the representations as to the engine the plaintiff agreed to deliver; that defendant, on the twenty-sixth day of December, 1912, addressed a letter to the plaintiff, stating that the engine had “proved to be far from satisfactory. . . . The engine is not built for the work intended or for any durability. It is now out of commission. I have asked you people to send your mechanic, but no answer,” and in said letter asked for a cancellation of his note and a return of the money paid down when he received the tractor; that Horstman, after some further reasoning with the defendant, induced the latter to give it a further trial; that, from the very beginning of the repeated trials by defendant, parts of the engine broke or proved to be defective or incapable of the performance of their respective mechanical functions; that, from time to time, as the breakages occurred, or as the machine in certain particulars was upon repeated tests shown to be so defectively constructed as to render it inefficient for the purpose for which it was intended, the defendant notified the plaintiff thereof, insisted that the engine was a failure and refused to accept it; that the plaintiff and (on one occasion) the manufacturer supplied the broken parts of the engine with new parts; that the plaintiff sent an expert to the ranch of the defendant to assist in giving the engine a proper test; that Horstman on numerous occasions urged defendant to give the machine a

fair and further trial before refusing to accept the engine. In brief, the jury were well within the testimony adduced in finding, as their verdict implies that they did find, that the engine never at any time measured up to the warranted test; that the defendant never at any time unconditionally accepted it; that the whole transaction was at all times, after the engine was delivered to defendant, the subject of controversy between the latter on the one side and Horstman and the plaintiff on the other, founded upon repeated complaints by the defendant of the unsatisfactory work of the engine and his refusal to accept the machine.

It will not, of course, be disputed that the failure of the engine to come up to the standard for efficiency and durability represented and warranted by the plaintiff constituted a breach of the warranty. That it did wholly fail to come up to that standard, the evidence strongly tends to show. Nor will it be doubted that there is evidence warranting the implied finding that Horstman was a general sales agent of the plaintiff, vested with full authority to do whatever was reasonably requisite to effect a sale of the machine to the defendant; that, as such agent, he was authorized to waive any of the conditions of the original contract and waive written notice by the defendant of the defective and unsatisfactory operation of the tractor; and that he did, if, indeed, the plaintiff itself did not, waive the condition specified in the written order as to the time within which the defendant was to be restricted in trying out or testing the efficiency of the engine. In fact, as before suggested, the written order did not involve an unconditional agreement of sale, and the fact that the engine delivered was in material particulars different in mechanical construction from the one which the plaintiff agreed to deliver, and the further fact that it was delivered, through no fault of the defendant, at a season of the year when a satisfactory test of the tractor was impracticable, themselves necessarily operated to entitle the defendant to a reasonable time beyond that prescribed in the order, and under conditions more favorable for that purpose than existed at the time of delivery, to put the engine to a proper test.

A case in its facts substantially like this is that of *Springfield Engine & Thresher Co. v. Kennedy*, 7 Ind. App. 502, [34 N. E. 856]. It was there contended that the findings did not show that the agent of the plaintiff who sold a steam sepa-

rator to the defendant was the general agent of the plaintiff, and, therefore, was without authority to waive conditions in the contract of warranty. The court, replying to that contention, said: "Mitchner was the agent of the plaintiff to make sales of its machinery, and at the time he received the notice of the defects in the separator, and made the attempt to remedy the same, the findings show that he was the authorized agent of the plaintiff. *All that he did and caused to be done in relation to remedying the defects, and the promises made by him, were in the line of perfecting and completing the sale.* [Italics ours.] The contract made in the first instance was not an unconditional contract for the sale of the machine. The defendants had the right to return it if unsatisfactory. It is a familiar rule that notice to an agent is notice to the principal of any matter that is within the scope of the agency. In *Pittsburgh etc. Ry. Co. v. Ruby*, 38 Ind. 294, [10 Am. Rep. 111], it was held that 'notice to an agent of a corporation relating to any matter of which he has the management and control is notice to the corporation.' This rule is peculiarly applicable to foreign corporations doing business in this state. (*Phoenix Mut. Life Ins. Co. v. Hinesley*, 75 Ind. 1; *North British & M. Ins. Co. v. Crutchfield*, 108 Ind. 518, [9 N. E. 458].) The terms 'general agent' and 'special agent' are relative. An agent may have power to act for his principal in all matters. He is then strictly a general agent. He may have power to act for him in particular matters. He is then a special agent. But within the scope of such particular matters his powers may be general and with reference thereto he is a general agent. Mitchner was authorized to make sales of plaintiff's machinery in certain localities. His powers for that purpose were general, and with reference thereto he was a general agent. As such, he received notice of the defects in said machinery, and notice to him was notice to the principal. His subsequent acts and promises were in the line of perfecting the sale. We think he had the right to waive the written notice required by the contract and of the other stipulations therein contained which were for the benefit of appellant. . . . We find no reversible error in the record. Judgment affirmed, at costs of appellant." (See, also, *Peterson v. Walter A. Wood Mowing & Reaping Machine Co.*, 97 Iowa, 148, [59 Am. St. Rep. 399, 66 N. W. 96]; *D. M. Osborne & Co. v. Backer*, 81 Iowa, 375, [47 N. W. 70]; *Hull v. Prairie Queen Mfg. Co.*,

92 Kan. 538, [141 Pac. 592]; *Pitsinowsky v. Beardsley*, 37 Iowa, 9; *First Nat. Bank v. Dutcher*, 128 Iowa, 413, [1 L. R. A. (N. S.) 142, 104 N. W. 497]; *Harrison v. Russell*, 12 Idaho, 624 [87 Pac. 784]; *Sandwich Mfg. Co. v. Feary*, 22 Neb. 53, [33 N. W. 485]; *McCormick Harvesting Machine Co. v. Dodkins*, 24 Ky. Law Rep. 2306, [73 S. W. 1129]; *Luitweiler Pumping Engine Co. v. Ukiah Water & I. Co.*, 16 Cal. App. 198, [116 Pac. 707, 712].)

Summarizing the conclusions announced in the above cases, whose facts are quite similar to those of the case at bar, they are: 1. That the question of a breach of warranty such as the one involved in this case is, upon conflicting evidence, one for the jury; 2. That where, in such case, there is a requirement in the contract that notice of the failure of the machine to work properly must be given within a specified time after its receipt, such notice is waived by the continued and persistent efforts of the seller's agents, including the one who made the sale, to make the machine work after the expiration of the time limited; 3. That, under such facts as are present here, a sales agent's authority extends to all such acts as are properly connected with the sale and delivery of the machine, hence his authority does not stop when the proposed vendee first takes the machine on trial, but continues until the sale should either be completed or the machine returned without any sale being made; 4. That, although the contract of sale stipulates that the purchaser shall give written notice to the seller of any defects in the machinery purchased, and in effect provides that the failure to give such notice shall constitute a waiver of any breach of warranty, if the agent of the seller is present at the trial of the machine, and in this manner has knowledge that the machine is not performing according to warranty, the provision as to notice is waived.

As above stated, the facts of this case bring it well within the doctrines above enunciated. There is, therefore, no ground for the contention of the plaintiff that the acts of Horstman with reference to the transaction after the execution of the order by defendant had the effect of modifying or altering the terms of said order or of introducing a new term therein.

It is claimed that the ruling allowing in evidence the catalogues and photographs, published by the plaintiff, showing the character and mechanism of the tractor referred to in the written order and which were exhibited to the defendant by

Horstman when he first opened negotiations for a sale of the engine to defendant, was erroneous and prejudicial. The point is devoid of merit. The written order does not contain a detailed description of the machine bargained for in the first instance, and it was proper to show that the defendant was induced by the representations contained in the plaintiff's catalogue and photograph of the machine to enter into the agreement. (*Luitweiler etc. Engine Co. v. Ukiah Water etc. Co.*, 16 Cal. App. 198, 210, [116 Pac. 707, 712].)

There are other rulings as to evidence admitted against objection by the plaintiff which it is claimed involved error and seriously affected plaintiff's rights. We will not give these special notice herein. It is sufficient to say that we have carefully considered them and are convinced that they could not have had the effect of damaging the plaintiff's rights, even if it be true that some were without legal justification.

It is further complained that the court committed serious error in some of the instructions submitted for the jury's guidance in considering the evidence. The instructions referred to, it is insisted, erroneously stated and assumed: 1. That the plaintiff warranted the engine, whereas, so it is contended, the warranty is the warranty of the Pioneer Tractor Company, the maker of the engine; 2. That the written warranty could be waived by the plaintiff; 3. That the jury were authorized to consider any evidence tending to show that after difficulties arose in the operation of the engine the agent of plaintiff induced the defendant to make further trial thereof after the time limited by the warranty.

All the above propositions have already been considered and disposed of herein. It may be added, however, referring to the first of the stated objections under this head, that the warranty of the Pioneer Company is, in the very nature of the situation as disclosed by the record, the warranty of the plaintiff. The latter, as the general distributing agent in California of the former, has necessarily assumed as such agent all the burdens and conditions of the warranty, this being shown by the undisputed fact that the contract as to the particular tractor in question is between the plaintiff and the defendant and not between the Pioneer Company and the defendant.

As to the point that the defendant does not plead a waiver and hence the case was tried upon an erroneous theory, the

reply is that, while neither in the answer nor cross-complaint is there a waiver specifically pleaded, all the facts of the transaction, from its inception to its finish, are set out in both those pleadings of the defendant, and from them the implication irresistibly follows that there was a waiver by the plaintiff of the condition in the warranty as to the time for trying out the machine.

We have found no reason for disturbing the result arrived at in the court below; and the judgment is accordingly affirmed.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 2, 1918.

---

[Civ. No. 2390. First Appellate District.—May 4, 1918.]

DINO DELLA MORA, Respondent, v. C. FAVILLA,  
Appellant.

**ORDER GRANTING NEW TRIAL—REASONS NOT SPECIFIED—RULE ON APPEAL.**—Where a new trial is granted without specifying reasons, if there is any good reason contained in the notice of motion, the order will not be disturbed on appeal.

**NEGLIGENCE—VIOLATION OF ORDINANCE.**—The violation of an ordinance in and of itself constitutes an established negligence.

**ID.—FALL UPON WET SIDEWALK—ORDER GRANTING NEW TRIAL—VIOLATION OF ORDINANCE.**—In an action for damages for personal injuries by slipping and falling on a steep sidewalk in the city and county of San Francisco, which had been washed by defendant at an hour when the washing of sidewalks was prohibited by ordinance, an order granting the plaintiff a new trial will not be disturbed on appeal, since the violation of such ordinance constitutes negligence.

**MUNICIPAL CORPORATIONS—ORDINANCE PROHIBITING WASHING OF SIDEWALKS BETWEEN CERTAIN HOURS—PURPOSE.**—An ordinance of the city and county of San Francisco making it unlawful to wash a sidewalk between the hours of 8 A. M. and 6 P. M. was designed principally to protect people upon the streets from the inconvenience or danger of wet and slippery sidewalks, rather than to conserve the water supply of the city.

APPEAL from an order of the Superior Court of the City and County of San Francisco granting a new trial. John Hunt, Judge.

The facts are stated in the opinion of the court.

James A. Bacigalupi, Edmund Nelson, and Michele Cimbalo, for Appellant.

Joseph A. Brown, and Frank J. Egan, for Respondent.

BEASLY, J., *pro tem.*—The plaintiff was injured by slipping and falling on a steep sidewalk in the city of San Francisco. The sidewalk had been wetted by being washed by the defendant at 10 o'clock on the morning of the accident, and it was claimed that the wet and slippery condition of the sidewalk caused the plaintiff to fall. By washing the sidewalk at that hour defendant violated an ordinance of the city and county which made it unlawful to wash a sidewalk between 8 A. M. and 6 P. M. The defenses were the legal contention that the ordinance was not designed for the protection of pedestrians on a sidewalk, but that its purpose was to conserve the water supply of the city, and hence, that it did not constitute negligence between the parties here for the defendant to wash the sidewalk in violation of the ordinance; and, second, the allegation as a fact in the answer that the plaintiff was intoxicated when the accident occurred, and that this either caused or contributed to his fall. The jury found for the defendant. The plaintiff moved for a new trial on the grounds of insufficiency of the evidence to justify the verdict; that it was against law; and of errors occurring at the trial. The court granted the motion without specifying its reasons. If, therefore, there is any good reason for granting it contained in the notice, the order will not be disturbed.

The trial court instructed the jury at length as to the bearing of this ordinance on the case, the gist of its charge on that subject being comprised in an instruction which read as follows: "The violation of an ordinance in and of itself constitutes and establishes negligence. Therefore, if the plaintiff in this case has satisfied you that the defendant here on the occasion in question violated that ordinance, then he has established negligence on the part of the defendant. And the



next question for you to determine would be whether such negligence on the part of the defendant directly contributed to and caused the injury that the plaintiff has suffered."

This instruction correctly stated the law, which is so well settled in this jurisdiction as to need no citation of authority to support it. If the broad proposition of law so established in this state, and given to the jury by the trial court in this case, is to be changed or modified, it must be done by the supreme court. It is not the function of this court to change it. This being so, the trial court was justified in holding that the negligence of the defendant was established.

It is contended that the sole purpose of this ordinance is to conserve the water supply of San Francisco; that it was not designed nor adopted for the purpose of protecting people upon the streets from the inconvenience or danger of wet and slippery sidewalks.

With this contention we are unable to agree. The ordinance provides that sidewalks shall not be washed between the hours of 8 A. M. and 6 P. M. It is a matter of judicial knowledge that the heaviest foot-passenger traffic upon the streets of San Francisco takes place between those hours, and that pedestrians would be annoyed and inconvenienced, and upon the steeper sidewalks of the city endangered, by having the sidewalks wet and slippery when pedestrians were most numerous thereon. For these reasons we think it clear that while the ordinance may have been designed also to conserve the water supply of the city, another purpose, and the principal purpose of the ordinance, obviously was that the sidewalks should not be made inconvenient, annoying, and dangerous to the pedestrian population of the city during the hours when most in use.

The other question involved in the action was that of contributory negligence upon the part of the plaintiff, it being contended by the defendant that the plaintiff at the time of the accident was intoxicated, and that his intoxication contributed thereto.

The defendant himself testified that he had not drunk anything that morning. He was strongly corroborated by other witnesses, although the testimony upon this point was not all one way. The trial court had the witnesses before it. The verdict of the jury must have been based, in view of the law as to the violation of the ordinance establishing negligence in

the defendant, upon the contributory negligence of the plaintiff. If the trial court, having the evidence before it and having seen the witnesses, determined that the verdict upon this point was not supported by the evidence, then it was the duty of the trial court to do exactly what it did, namely, to grant the plaintiff a new trial. Presuming that the trial court acted either upon a conviction that its instruction that negligence was established by proof of the violation of the ordinance was not followed by the jury, or that the jury found contributory negligence upon the part of the plaintiff when by the great preponderance of the evidence such contributory negligence did not exist, and accordingly granted a new trial, the order granting the same must be affirmed. It is so ordered.

Kerrigan, J., and Zook, J., *pro tem.*, concurred.

---

[Civ. No. 2370. First Appellate District.—May 6, 1918.]

LUIGI CROCE, as Administrator, etc., Plaintiff and Respondent, v. MARY BAZZURO, Defendant and Appellant; ANNA ROSE MARY BAZZURO (a Minor), Defendant and Respondent.

**ACTION TO ENFORCE TRUST—STATUTE OF LIMITATIONS.**—An action by the administrator of the estate of a deceased person to recover a sum of money from the defendants upon allegations that they received the money in trust for the heirs of the deceased upon a fire insurance policy is barred by the provisions of section 343 of the Code of Civil Procedure, requiring actions for relief not otherwise provided for to be commenced within four years, where the action was not commenced within four years of the time when the defendants filed their answer in another action to have it declared that they held the insured property in trust, in which latter action they set up adverse possession.

**DISTRIBUTION OF TRUST ESTATE TO HEIRS OF TRUSTEE—RUNNING OF STATUTE OF LIMITATIONS.**—Where property held in trust is distributed to the heirs of the trustee, the heirs take as involuntary trustees, the statute of limitations to recover the property begins to run at the time of distribution, and no repudiation of the trust is necessary to set the statute in motion.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. George H. Cabaniss, Judge.

The facts are stated in the opinion of the court.

D. Freidenrich, for Appellant.

John J. Mazza, and W. E. White, for Respondent Croce.

Harold C. Reyman, for Respondent Anna Rose Mary Bazzuro.

BEASLY, J., *pro tem.*—This action was begun some time previous to the ninth day of October, 1914, by Luigi Croce, as administrator of the estate of Francesco Bazzuro, against Mary Bazzuro and Anna Rose Mary Bazzuro, a minor daughter of Mary, to recover \$1,960 from the defendants upon allegations that they received this fund in trust for the heirs of the deceased Francesco upon a fire insurance policy for loss sustained by the destruction of a building in the fire of April 18, 1906, and also to recover five hundred dollars alleged to have been collected by the defendants as rents from the tenants of the building covered by the policy. The facts supporting the action were these: Francesco Bazzuro died intestate in 1879. At his death he held a mortgage upon a lot in San Francisco on which the building above mentioned was situated. His brother, Giuseppe Bazzuro, was appointed administrator of the estate and as such foreclosed this mortgage, bought in the property at the amount of the mortgage at a sale in the foreclosure proceedings, and obtained a sheriff's deed as administrator of his brother's estate in the year 1884. In that condition the matter rested until the death of Giuseppe, which occurred in 1904. A year after the death of Giuseppe, the plaintiff, Luigi Croce, was appointed administrator of the estate of Francesco to succeed Giuseppe, and he is still the administrator of that estate. The defendant Mary is the widow of Giuseppe, and Anna Rose Mary is the daughter of Giuseppe and Mary. Mary and Anna Rose Mary are the only heirs at law of Giuseppe. On the fifteenth day of July, 1905, a decree of distribution was entered in Giuseppe's estate by which all of the property vested in him at his death was distributed in equal shares to his widow and

child. On the tenth day of October, 1905, Mary caused the building on the property to be insured against fire in the sum of two thousand dollars. The policy was made payable to the estate of Giuseppe. About the 7th of November following, Mary caused the name of the insured in the policy to be changed from the "Estate of Giuseppe" to "Mrs. Mary Bazzuro." The building was totally destroyed by fire on April 18, 1906, and on the 7th of July succeeding, the defendants collected \$1,960 upon the policy because of the loss. On the twenty-fifth day of September, 1913, in an action theretofore begun by the plaintiff and the defendants herein, the court made its decree that the real property distributed in the complaint was, at that time and had been from the month of October, 1904, held by the defendants in trust for the heirs at law of Francesco Bazzuro and required the defendants to convey the real property in trust for the said heirs and subject to administration of Francesco's estate. On the first day of November, 1913, a commissioner, appointed by the court in that action for the purpose, executed and delivered to plaintiff a deed pursuant to that decree, conveying to him, as administrator, the real property described in the complaint herein in trust for the heirs at law of Francesco and subject to administration of his estate. Before the destruction of the building Mary had collected five hundred dollars as rent from tenants thereof.

The insurance money and the rent were not mentioned nor prayed for in the action to recover the real property above referred to. The complaint alleged that the plaintiff had no knowledge, information, or belief that the building was insured or that the defendants had collected the insurance until about six months prior to the commencement of this action, and that thereafter plaintiff used all reasonable diligence in ascertaining the amount of insurance and when and from what company the same had been collected. Plaintiff did not obtain that information until the twenty-third day of January, 1915.

The plaintiff had judgment in the action for the insurance money and rent and interest thereon from the time the funds came into Mary's hands. Judgment was given in favor of Anna Rose Mary. From the judgment against herself the defendant Mary appeals.

The statute of limitations seems to us to be an insuperable obstacle to the affirmance of this judgment. The particular section of the statute depended upon is section 343 of the Code of Civil Procedure, which states that an action for relief, not provided for in the preceding sections of that code, must be commenced within four years after the cause of action shall have accrued. The cause of action here, certainly in any view, must be held to have accrued at the time of the filing of the answer of Mary Bazzuro in the case in which the land was recovered to the administrator of the estate of Francesco, for in her answer in that case she flatly repudiated any trust which it was claimed reposed in her on account of the facts hereinbefore recited. In that action the answer set up adverse possession by Giuseppe and by the defendants, Mary and her daughter, a position entirely inconsistent with the trust; for in that action the defendants, Mary and her daughter, claimed that the title was vested in them, which claim constituted a denial that they held the property in trust and also in effect a denial that the plaintiff was entitled to the property for the purposes of administration. This adverse claim set the statute in motion, even conceding that a repudiation of the trust was necessary to do so. However, no repudiation of this trust seems to have been necessary to set this statute in motion, for the facts bring it within the rule of *Norton v. Bassett*, 154 Cal. 411, [129 Am. St. Rep. 162. 97 Pac. 894]. The facts of that case were nearly identical with those in this case. Bassett, Sr., held certain property in trust for Norton. He died, and the property was distributed to his son. An action was begun against the latter without a repudiation by him of the trust. The supreme court held that no repudiation was necessary to set the statute in motion upon the ground that the younger Bassett was not a trustee of a voluntary trust, but of an involuntary trust, and that as a trustee of a trust obligation cast upon him by law, he could plead the four years statute of limitation without having repudiated the trust. The court, in discussing the matter, said: "In the case at bar the trust cast on the defendant Bassett was an involuntary one. The plaintiffs had a right to proceed to enforce their claim to the trust property immediately the title to the trust property vested in the defendant Bassett as an involuntary or constructive trustee; the statute commenced to run from that date, and this action, not having been com-

menced until over five years thereafter, was barred by the provisions of the statute requiring such actions to be commenced within four years from the time the right of action accrues." That case holds that an heir to whom property which his ancestor has held as trustee is distributed takes and holds as an involuntary trustee in whose favor the period of limitation begins to run on the distribution of the property to him, and is, therefore, authority for holding that this action was barred by limitation at the time that it was begun.

In passing it may be said that the allegations of lack of knowledge on the part of plaintiff of the collection of the insurance money are not sufficient to stay the running of the statute, as those allegations do not amount to a charge of undiscovered fraud on the part of Mary Bazzuro.

The judgment is reversed.

Kerrigan, J., and Zook, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 2, 1918.

---

[Civ. No. 2394. First Appellate District.—May 7, 1918.]

ANNA LINN et al., Respondents, v. F. C. PIERSOL,  
Appellant.

**APPEAL—JUDGMENT—ORDERS DENYING NONSUIT AND DIRECTED VERDICT—CHANGE OF STATUTE—REVIEW.**—On an appeal from a judgment taken more than sixty days after its entry, the action of the court in denying motions for nonsuit and directed verdict are reviewable, where the case is one where the statute abolishing appeal from orders denying a new trial went into effect while motion for new trial was pending and undecided.

**ID.—UNDERTAKING ON APPEAL—TIME FOR FILING.**—Where notice of appeal is filed before the expiration of the statutory period, an undertaking filed within five days thereafter is within time, although the undertaking was filed more than six months after the judgment.

**NEGLIGENCE—ACTION FOR MALPRACTICE—MISTAKE OF JUDGMENT—NON-LIABILITY FOR DAMAGES.**—In an action against a physician for alleged negligence in the use by him in an operation of nonabsorb-

able silk sutures instead of catgut, the defendant cannot be held liable where it is shown that he performed two operations, and that on the first he used catgut, from which a hemorrhage resulted, and therefore he used silk in the second operation, it being at most a mistake in weighing the probable consequences of the use of the different materials.

**PHYSICIANS AND SURGEONS—ORDINARY SKILL.**—A physician is required to possess only ordinary skill in his profession and to use his best judgment in the exercise of that skill.

**APPEAL** from a judgment of the Superior Court of Mendocino County. J. Q. White, Judge.

The facts are stated in the opinion of the court.

J. K. Piersol, Thomas & Thomas, and Robert Duncan, for Appellant.

Mannon & Mannon, for Respondents.

**ZOOK, J., pro tem.**—In this action, defendant, a physician, appeals from a judgment in favor of plaintiff, Anna Linn, in an action for his alleged malpractice. His main point on this appeal is that there was no showing of negligence on his part sufficient to warrant sending the case to the jury, and that, therefore, either his motion for nonsuit or his motion for a directed verdict should have been granted.

Respondents contend that this point cannot be considered because the appeal was taken more than sixty days after the entry of the judgment. The case is one where the statute abolishing the appeal from orders denying a new trial went into effect while the motion for new trial was pending and undecided, and under the decision of this court in *Nathan v. Porter*, 36 Cal. App. 356, [172 Pac. 170], it is proper on the appeal from the judgment to review the action of the lower court on the motion for new trial, and to use the bill of exceptions for that purpose. The action of the court in denying the motions for nonsuit and for directed verdict is, therefore, reviewable on this appeal. Respondents' further claim that the appeal should be dismissed because the undertaking on appeal was filed more than six months after the judgment is without merit. The notice of appeal was filed before the expiration of the statutory period and the undertaking was

filed within five days thereafter and was within time. (*Lowell v. Lowell*, 55 Cal. 316.)

The alleged negligence of the physician for which plaintiff sought to recover lay in the use by him in an operation of non-absorbable silk sutures instead of catgut. The only testimony in the record to show that this was improper is contained in an answer to a single question propounded to Dr. Marquis, one of plaintiffs' witnesses, who testified that a careful surgeon would not use silk in the place where it had been used. On cross-examination he admitted, however, that, where a physician requires a ligature that will hold fast to prevent bleeding, he may with propriety use the silk, and he made it clear that his previous answer was based entirely on the conditions as he found them at an operation performed by himself six months after the operation by appellant. The only other medical witness for respondents testified that the choice between silk and catgut is a matter of judgment in each particular case, and there is no testimony in the record to show that, under the conditions as they appeared to appellant when he performed the operation, the use of silk was negligence. It appeared from appellant's testimony that he had performed two operations on Mrs. Linn; that on the first occasion he had had trouble from hemorrhage as a result of the use of catgut, and that therefore he had used silk on the second occasion. It is true that the results of the use of the nonabsorbable silk in the case at bar proved unfortunate, as the silk caused certain perforations of the intestine, which produced serious trouble, but it is clear that on the second operation appellant was in a dilemma. The use of catgut had resulted in hemorrhage before, which he wished to guard against, and the use of silk might produce irrigation. Under the circumstances, he should not be held liable for what was at most a mistake of judgment in weighing the probable consequences of the different methods that might be pursued. A physician is required to possess only ordinary skill in his profession and to use his best judgment in the exercise of that skill, and if he complies with these requirements, he is not liable for the nonsuccess of his treatment. (*McGraw v. Kerr*, 23 Colo. App. 163, [128 Pac. 870, 873]; *Houghton v. Dickson*, 29 Cal. App. 321, [155 Pac. 128]; *Foreman v. Hunter Lumber Co.*, 36 Cal. App. 763, [173 Pac. 408].)



The motion for a new trial should have been granted, as the court's orders denying the motions for nonsuit and for directed verdict were erroneous.

The motion to dismiss appeal is denied.

Judgment reversed.

Kerrigan, J., and Beasley, J., *pro tem.*, concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on June 6, 1918.

---

[Civ. No. 2395. First Appellate District.—May 8, 1918.]

E. L. ANDERSON, Appellant, v. NEAL INSTITUTES COMPANY (a Corporation), et al., Respondents.

**SPECIFIC PERFORMANCE—CONTRACT IMPOSSIBLE TO ENFORCE.**—When the enforcement of a contract by decree of court is difficult or practically impossible, specific performance will not be granted.

**INJUNCTION—BREACH OF CONTRACT—AFFIRMATIVE AND NEGATIVE COVENANTS IMPOSSIBLE OF ENFORCEMENT.**—In view of subdivision 5 of section 526 of the Code of Civil Procedure, providing an injunction cannot be granted to prevent the breach of a contract the performance of which could not be specifically enforced, a contract containing affirmative and negative covenants impossible of enforcement will not support a suit for an injunction to restrain breach.

**ID.—CONTRACT TO PREPARE AND FURNISH MEDICINES—EXCLUSIVE RIGHT TO USE—PREVENTION OF BREACH.**—An injunction will not lie to prevent the breach of a contract requiring a medical institute company to prepare and furnish medicines and advertising literature and to give plaintiff the exclusive right to use the remedies.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. Frank J. Murasky, Judge.

The facts are stated in the opinion of the court.

Walter Perry Johnson, and James D. Thurman, for Appellant.

David A. Nelson, for Respondents.

KERRIGAN, J.—This is an appeal by plaintiff from a judgment entered in favor of defendants upon an order sustaining a general demurrer to plaintiff's amended and supplemental complaint without leave to amend.

The facts as alleged in the complaint, stripped of legal verbiage, are substantially as follows: The defendant, Neal Institutes Company, has been for several years continuously engaged in the business of preparing and distributing certain medical remedies, known as the Neal remedies, for the treatment of patients addicted to the excessive use of alcoholic liquors and pernicious drugs; and it maintains, either directly or through persons acting by its license and permission, institutes in various cities of the United States for the purpose of treating patients according to its system of treatment and by the use of its remedies. By a written contract, made in March, 1910, between the plaintiff and the Neal Institutes Company, the latter granted to plaintiff for a term of ninety-nine years the exclusive right to advertise and use the Neal remedies and the Neal method of treatment in the northern half of the state of California, and to use the name "Neal" in connection with such institutes as might be established by plaintiff in his territory. The company further agreed to supply to plaintiff on his order such of the company's medicines and advertising literature as he might require.

Pursuant to the contract the plaintiff, in May, 1910, established an institute in San Francisco at No. 1409 Sutter Street under the name of the Neal Institute, sometimes followed in advertisements by the descriptive term "of San Francisco." This institute has been continuously maintained by plaintiff and plaintiff's patients there treated with the Neal remedies supplied by the Neal Institutes Company; and by extensive advertising and by the personal care and attention of plaintiff throughout a period of about five and a half years prior to the commencement of the action plaintiff built up a valuable business for his institute, and it acquired a highly valuable goodwill. In the month of November, 1913, the Neal Institutes Company, acting in confederation with the other defendants, established, and has since continuously maintained, a rival institute in San Francisco at No. 1550 Fell Street under the name of the Neal Institute of San Francisco. Since this last-named institute was established the Neal Institutes Company has refused to furnish any of its remedies to the plaintiff,

but has been furnishing them to the rival institute, and the defendants have there treated patients according to the Neal system and by use of the Neal remedies.

It is charged by plaintiff that the defendants have so acted as to appropriate to themselves the benefit of plaintiff's personal work and of the advertising done by him, and have diverted to their institute business and patronage rightfully belonging to plaintiff, and have thereby seriously prejudiced plaintiff's business and impaired the goodwill attached to his institute. By reason of the injury, stated in the complaint to be irreparable, caused to plaintiff and his business through the acts of the defendants, plaintiff instituted this action on November 20, 1915, praying for a prohibitory injunction and an accounting. Subsequently, and on March 28, 1916, an amended and supplemental complaint was filed by leave of court, to which the defendants jointly interposed a demurrer. After a hearing had upon the demurrer the trial court held that an injunction could not properly be granted; and the demurrer being sustained without leave to amend, judgment was entered in favor of the defendants.

The question to be determined on this appeal, therefore, is whether the amended and supplemental complaint states a cause of action, and if so, whether the plaintiff is entitled to a prohibitory injunction.

The contract which is the basis of the action contains affirmative and implied negative covenants; and it appearing from the nature of the contract that specific performance could not be decreed, it was the view of the trial judge that an injunction to prevent a breach of the contract would not lie. We think this view is correct.

When the enforcement of a contract by decree of court is difficult or practically impossible, specific performance will not be granted. "It is elementary," says Pomeroy in his work on Equity Jurisprudence, section 1405, "that the contract must be such that the court is able to make an effective decree for its specific performance, and is able to enforce its own decree when made." The contract here would require the defendant, Neal Institutes Company, to prepare the remedies used in the treatment of patients at the institutes which might be established by plaintiff, and this service is of such a character that courts could not make an effective decree for its performance. The impossibility of compelling performance

in a case of this kind is well illustrated by the case of *Barnes v. McAllister*, 18 How. Pr. (N. Y.) 534. Plaintiff concedes this principle of law, and accordingly does not ask for a mandatory injunction, directing said defendant to supply its remedies to plaintiff; but he does ask for a prohibitory injunction restraining the Neal Institutes Company from supplying its codefendants with said remedies in violation of its contract with plaintiff.

Where, as here, a contract contains both affirmative and negative stipulations, the authorities are in irreconcilable conflict upon the question whether equity will interfere to prevent a breach of the negative covenant when the affirmative covenant is of such a nature that it cannot be specifically enforced by a judicial decree. (2 High on Injunctions, sec. 1164.) For example, according to one line of authorities, where an opera singer or actor has contracted to sing or play for plaintiff at his theater and not elsewhere without his permission, defendant may be enjoined from singing or acting elsewhere, the court thus preventing a breach of a negative covenant, although it cannot specifically enforce the affirmative agreement by compelling defendant to sing or act for plaintiff. (*Lumley v. Wagner*, 1 De Gex, M. & G. 604, [42 Eng. Reprint, 687]; *Daly v. Smith*, 49 How. Pr. (N. Y.) 150; *McCaull v. Braham*, 16 Fed. 37.) So, where defendant had agreed to make printing-presses for the plaintiff, and to sell to plaintiff its entire output, and had expressly covenanted not to make them for any other person, an injunction was granted to restrain a violation of the negative stipulation, although the affirmative agreement was not capable of being specifically enforced against the defendant. (*Myers v. Steel Machine Co.*, 67 N. J. Eq. 300, [57 Atl. 1080].)

Another line of cases holds to the contrary. In *Welby v. Jacobs*, 171 Ill. 624, [40 L. R. A. 98, 49 N. E. 723], it was held that an injunction against the proprietor of a theater will not be granted to prevent the breach of a contract to furnish the theater and its equipment to the manager of a company for a certain period, and to prevent him from furnishing the theater to a rival company during that period, since it was impossible to compel the plaintiff to carry out his contract according to its terms. So, when an actor agreed in writing with a manager not to perform at any other theater for a term of ten years, and broke his agreement, it was held

that since the court could not enforce the positive part of the contract, it would not restrain by injunction a breach of the negative part. (*Hamblin v. Dinneford*, 2 Edw. Ch. (N. Y.) 529.)

In those cases it was said that in effect to enjoin one from doing something in violation of his contract is an indirect mode of enforcing the affirmative provisions of such contract; that it amounts to a negative specific performance of the contract, and that courts of equity will not do indirectly what they cannot do directly.

It thus appears, as before stated, that there is a conflict in the decisions as to whether, under the circumstances of a case like this, the plaintiff would be entitled to an injunction to restrain the violation of a negative covenant of his contract with the defendant; but in this state the question was put at rest at the time of the adoption of the Civil Code by the terms of subdivision 5 of section 3423 (since incorporated in the Code of Civil Procedure [section 526]), which provides: "An injunction cannot be granted. . . . 5. To prevent the breach of a contract, the performance of which would not be specifically enforced." The same policy was pursued by the legislature in adopting subdivision 1 of that section, the subject matter dealt with in which, like the one under consideration, had given rise to conflicting decisions by the courts. That such was the policy of the legislature has been declared with reference to subdivision 1 of section 3423. (*Spreckels v. Hawaiian Com. etc. Co.*, 117 Cal. 377, 379, [49 Pac. 353].)

Section 3274 of the Civil Code which, with section 3423, constitutes a part of the code entitled "Relief in General," reads: "Specific and preventive relief may be given in no other cases than those specified in this part of the Civil Code."

Subdivision 5 of section 3423 is free from ambiguity or uncertainty. It clearly declares as the law in this state the rule laid down in one of two opposing lines of authority. If there could be a doubt as to the intention of the legislature in this regard, it is removed by an examination of the notes to section 1912 of Field's Proposed Draft of the Civil Code of New York, which section was practically adopted in this state; and by an examination of the notes to subdivision 5, section 3423, of the Civil Code Annotated, 1874, where the following authorities, cited as the foundation of that provision, declare that the court will not interfere by injunction to prevent the viola-

tion of an agreement of which, from the nature of the subject, there could be no decree of specific performance. (*Newbery v. James*, 2 Mer. 446, [35 Eng. Reprint, 1011]; *Williams v. Williams*, 3 Mer. 160, [36 Eng. Reprint, 62]; *Hamblin v. Dinneford*, 2 Edw. Ch. (N. Y.) 529; *Sanquirico v. Benedotti*, 1 Barb. (N. Y.) 315.) References in the case of *Peterson v. McDonald*, 13 Cal. App. 644, [110 Pac. 465], and of *Farnum v. Clarke*, 148 Cal. 615, [84 Pac. 166], tend to support the view here taken.

California cases cited by plaintiff to sustain his position that an injunction will issue to restrain the violation of a negative covenant are not in point, being either an exception to the rule, or based on contracts negative in form, requiring a person to refrain from doing a certain thing, and having no affirmative covenants calling for specific performance. (22 Cyc. 845; 2 High on Injunctions, secs. 1134, 1166.)

From the allegations of the complaint in the case at bar it appears that plaintiff's rights spring from and grow out of a contract containing affirmative and negative stipulations and, therefore, the question as to whether or not he is entitled to injunctive relief is governed by the law as declared in subdivision 5 of section 3423 of the Civil Code. It thus appearing that the demurrer is well grounded with respect to the Neal Institutes Company, it follows that it is also well grounded as to the other defendants, who stand in the shoes of the company with regard to certain territory described in the contract. They were in effect the assignees of that company so far as the contract here involved is concerned, and, therefore, stand in the same relation to the plaintiff as their assignor.

The judgment is affirmed.

Beasley, J., *pro tem.*, and Zook, J., *pro tem.*, concurred.

[Crim. No. 436. Third Appellate District.—May 8, 1918.]

**THE PEOPLE, Respondent, v. FELIX ALLEN, Appellant.**

**INTOXICATING LIQUORS—PROSECUTION FOR SALE IN NO-LICENSE TERRITORY—TRIAL—REFUSAL OF CONTINUANCE WITHOUT ERROR.**—In a prosecution for selling alcoholic liquor in no-license territory, the refusal to grant a continuance for the purpose of giving the defendant an opportunity to produce a witness who would testify that he prepared at defendant's request a bottle of liquid resembling whisky but containing less than the inhibited quantity of alcohol, for sale for the purpose of playing a joke upon her, was not error, since such evidence was addressed to the intent of the defendant, which was immaterial.

**ID.—IMPLIED INTENT TO VIOLATE LAW—INSTRUCTION.**—In a prosecution for selling liquor in no-license territory, where there is proof beyond a reasonable doubt that the defendant sold the liquor, an instruction that in such a case the intent to violate the law is implied, is a correct statement.

**ID.—EVIDENCE—MEMORANDA.**—While under section 2047 of the Code of Civil Procedure a witness may refresh his memory respecting a fact by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, such section does not authorize the introduction in evidence of memoranda in corroboration of what a witness had testified to without resort to the memoranda.

**ID.—CHARACTER OF LIQUOR SOLD—EXPERT TESTIMONY UNNECESSARY.**—In a prosecution for the sale of alcoholic liquor in no-license territory, testimony of a person not an expert, familiar with the taste of whisky, that the liquid sold was whisky, is admissible, since the drinking of whisky is of such common occurrence that it does not require an expert to pronounce upon it.

**APPEAL** from a judgment of the Superior Court of Modoc County, and from an order denying a new trial. Clarence A. Raker, Judge.

The facts are stated in the opinion of the court.

Oscar Gibbons, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

CHIPMAN, P. J.—Defendant was informed against by the district attorney of Modoc County for the crime of unlawfully selling alcoholic liquors, to wit: "That on or about the twenty-ninth day of May, 1917, and before the filing of this information, at and in the county of Modoc, state of California, said Felix Allen then and there, within the incorporated limits of the town of Alturas, in said county, which was then and there no-license territory, willfully and unlawfully did sell and furnish alcoholic liquor, to wit: whisky, to one Lulu Sisson," contrary, etc. The cause was tried before a jury and defendant was found guilty. Judgment on the verdict was that defendant pay a fine of four hundred dollars and in default of payment that he be confined in the county jail of said county, one day for each two dollars of said fine. Defendant appeals from the judgment and from the order denying his motion for a new trial.

It is now urged that the court committed the following errors: 1. In refusing a continuance of the trial for the purpose of giving defendant the opportunity to produce the witness, A. Gibson; 2. Admitting expert testimony as to the character of the liquid introduced by the prosecution; 3. Rejecting testimony offered by defendant tending to show that, prior to the twenty-ninth day of May, 1917, the prosecuting witness, Lulu Sisson, was a spy; 4. Permitting the witnesses, Lulu Sisson and Mrs. Geo. Campbell, to be corroborated by their notes in writing made of matters to which they had testified; 5. In giving instructions numbers 1 and 5.

The information was filed on November 22, 1917, and defendant, being in court, was given until the next day, November 23d, in which to answer the arraignment, and on that day defendant pleaded not guilty and the cause was set down for trial on December 5, 1917. The cause then being called for trial, defendant moved for a continuance and the matter was continued to December 7, 1917. The proceedings had at the arraignment on motion for continuance were read and the court denied the motion and ordered the jury to be drawn. The motion for continuance was based in part upon the shortness of time between the arraignment and the date set for trial, defendant's attorney claiming that he had not sufficient time in which to prepare his defense, but principally the ground for the motion was based upon other facts set out in the defendant's affidavit filed in support of the motion, and



which related to the testimony of one A. Gibson, who, it is alleged, was a necessary witness in the case for defendant. It was stated in the affidavit that affiant was informed and believed that at said time the said Gibson was "either out of the state of California or at the southern extremity of the same, in the government service." That on November 23, 1917, defendant had caused to be issued a subpoena for said Gibson and placed in the hands of the sheriff of Modoc County, and that said sheriff has ever since been unable to locate said witness in said county of Modoc. That on the twenty-sixth day of November, 1917, defendant prepared an affidavit entitling him to a foreign subpoena for said witness, but owing to the absence of the judge of said court, was not able until the twenty-seventh day of November to obtain the necessary order, and on the twenty-eighth day of November he caused said subpoena to be deposited in the United States postoffice at Alturas, inclosed in a sealed envelope addressed to the sheriff of San Diego County, California, at San Diego, with postage prepaid thereon, and inclosing therewith a letter instructing said sheriff to serve the said subpoena and informing him that the said Gibson was in a United States training camp in San Diego County. That no return has ever been made by said sheriff of his proceedings under said subpoena, and no word has been received by defendant or his attorney in response to said communication. That said sheriff maintains an office in the city of San Diego, California, between which city and Alturas there is a regular communication by mail, and that the two places are more than one thousand miles apart. It is further alleged in the affidavit "that said A. Gibson is a necessary and material witness in this action, and without his testimony being had and taken at said trial I cannot safely proceed to trial. That I expect to prove by said witness that on the twenty-ninth day of May, 1917, between the hours of 1 and 2 o'clock in the afternoon thereof, I went to the drug-store then and there owned and operated by said A. Gibson in said town of Alturas, in company with divers other persons, and did then and there tell said A. Gibson, in the presence of said other persons that I had been asked by the Lulu Sisson mentioned in the information in this action to furnish her (the said Lulu Sisson) with a bottle of whisky. That I further told him that I desired to have his (the said A. Gibson's) assistance in mixing a bottle of liquid

resembling whisky as far as possible in color, smell, and taste, save that the same should not contain more than one per cent of alcohol. That said A. Gibson thereupon furnished certain appliances and assisted me in preparing said described liquid. That thereupon said liquid was placed in a quart bottle in the presence of said A. Gibson and said other persons and was wrapped in a piece of paper and by me taken to the house of said Lulu Sisson, in said town of Alturas." It is further alleged that the said Gibson is the only witness by whom affiant could prove that the said liquid contained only one per cent of alcohol or by whom he could prove the quantity or quality of all the ingredients contained in the liquid delivered to the prosecuting witness, Lulu Sisson. Affiant further states in his affidavit: "I further expect to prove by said A. Gibson that at divers times and places prior to the twenty-ninth day of May, 1917, that I have stated that Lulu Sisson was in my opinion trying to earn a reward by asking people to furnish her liquor, and that in my opinion anyone would be very foolish to accede to her requests." He further states that said A. Gibson will testify to the matters above set forth if his presence be had at said trial or if his deposition be taken, and that said Gibson is at present in or around the United States training camp in San Diego County.

On December 8th, while the trial was progressing, counsel for defendant again renewed his motion for a continuance, based on information which that day had been received by the sheriff of Modoc County by letter written to him by the sheriff of San Diego County, dated December 4, 1917, in which it was stated, among other things: "I am returning herewith subpoena *in re* People v. Felix Allen, which was sent to me for service. On going to the Camp Kearney, I found that this man had been discharged October 6, 1917." Considered with this second motion were the proceedings taken at the time the first motion was heard. As to the ruling of the court on defendant's motion made after the letter from the sheriff of San Diego County was received and the subpoena returned by him "not found," we cannot say there was prejudicial error. No additional facts were produced at this time and no assurance offered that the witness could be found. The case had progressed nearly to its conclusion. It would have been an unreasonable exercise of discretion for the court to continue the case at that stage to an indefinite period and

to excuse the jury with leave to return to their homes until such period might arrive. As to the ruling on the motion made at the arraignment and before the day for the trial was set and at the opening of the trial, we think enough appeared to justify the court in granting the continuance asked. But we cannot say, in view of the showing made, that its refusal demands a reversal of the judgment. The defense, indeed the only defense made, was that defendant knew the prosecuting witness, Lulu Sisson, to be a spy and was engaged in an effort to induce him to sell her a bottle of whisky in order to obtain the county reward offered; that he conceived the idea of "playing a joke upon her" by selling her a bottle of liquid resembling whisky, but in fact containing less than one per cent of alcohol; that he explained his scheme to several different persons and Dr. Gibson, a druggist in the town, who, as defendant testified, prepared a bottle of the simulated whisky. gave it to defendant, who immediately took it to Mrs. Sisson's home and sold and delivered it to her, and that this was the bottle and only bottle of liquid of any kind delivered by him to her.

It is perhaps best at this point to state the evidence on which the verdict was based, as it necessarily has much to do with our conclusion upon the several assignments of error. The evidence was that Mrs. Sisson was engaged in ferreting out violations of the no-license law; that she suspected defendant of being engaged in the illicit traffic in alcoholic liquor; that to confirm her suspicions, and, as she admitted, to earn the reward offered by the county, she sought a meeting with defendant at which he agreed to sell and deliver to her at her house a bottle of whisky at 2 o'clock in the afternoon of May 29, 1917; Mrs. Sisson arranged to have her sister-in-law, Mrs. Campbell, and Lily Ferraris, a house servant, so concealed as witnesses unknown to defendant and hear what took place when defendant came to the Sisson house. These three women testified that defendant came to Mrs. Sisson's house on the day and at the hour agreed upon; was admitted and stated to Mrs. Sisson he had brought her the bottle of whisky as he had promised to do, and told her the price was \$1.50; that he took the bottle from his coat pocket and delivered it to Mrs. Sisson; that she found she had but \$1.40, which she gave him, saying she would pay him the remaining ten cents when she next saw him; that he took the money and went

away. The conversation between Mrs. Sisson and defendant was testified to and there was substantial agreement in the testimony of these three witnesses as to what was there said and done, and it agreed substantially with the testimony of the defendant, except that he testified he did not know what was in the bottle. As soon as defendant departed, Mrs. Campbell and Miss Ferraris came out from their place of concealment, examined the bottle carefully, and were able to and did identify it when produced in court; Mrs. Sisson immediately notified Deputy Sheriff Estes, who came to her house in the evening of that day, uncorked the bottle, and drank of its contents. His testimony was that it was "good whisky"; the bottle was delivered to him at that time; he sealed it and thereafter it was cared for by him until it was brought into court in the same condition as when he received it. In the presence of the court and jury he removed the cork and again sampled the contents and pronounced it whisky. Dr. John Style, a practicing physician, was called as a witness. He testified that he had drunk whisky and could distinguish the difference between whisky and nonalcoholic liquids "by taste and smell—by taste practically." He sampled the contents of this bottle and pronounced it whisky.

It is not claimed that Dr. Gibson could or would testify, if present, further than that at defendant's request, and for the purpose defendant explained to him, he filled and gave to defendant a bottle resembling the one in evidence, but containing less than one per cent of alcohol. And the witness who saw the druggist in the act of making up the compound, whatever it was, testified that they saw the bottle delivered to defendant by Dr. Gibson and saw defendant immediately thereafter drive in his automobile to and enter Mrs. Sisson's house. What defendant did after entering the house they knew not. The most that can be claimed from what Dr. Gibson could testify to and what the witnesses who testified saw done by him and by defendant is, that the mixture prepared by Dr. Gibson contained less than the inhibited per cent of alcohol, and that these facts tended to show an innocent intent on defendant's part. If Dr. Gibson gave defendant a bottle whose contents were innocuous, the evidence conclusively shows that it was not the one delivered to Mrs. Sisson by defendant, and as it is not pretended that this change of bottles could have happened through any agency other than defendant's, it entirely overthrows any inference of innocent intent to be drawn

from anything Dr. Gibson could have testified to. But the law upon this question of intent, in this class of cases, treats the element of intent as immaterial. The rule is stated as follows in the case of the *People v. Pera*, 36 Cal. App. 292, [171 Pac. 1091]: "The decisions appear to be quite uniform upon the proposition that where, in invoking and applying the police power, the legislature has prohibited certain acts and denounced them as criminal, the mere commission of such acts, regardless of the intent with which they were committed, is sufficient to constitute the crime so denounced. There are, perhaps, certain exceptions to this rule, as, for instance, where the statute itself uses language in describing or defining the crime indicating that *scienter* or a specific intent to do the act was essential to constitute it a crime. But particularly in cases interdicting the traffic in intoxicating liquors the rule generally is that the mere commission of the act is sufficient to consummate the offense, and in the present case the law authorizing the establishment of 'no-license territory' uses no language indicating an intention in the legislature to make the intent with which the act of keeping a resort for the purpose of selling intoxicating liquors is committed an ingredient of the offense."

The case of *Commonwealth v. Holstine*, 132 Pa. St. 357, [19 Atl. 273], is cited, where the court said: "It is not necessary to sustain a conviction for selling intoxicating liquors under the act of 1887 for the commonwealth to prove a criminal intent. It is enough to show the sale, when the defendant may, if he can, shield himself behind a license. If the sale is contrary to law, the intent has nothing to do with it. A contrary ruling would fritter away the act of 1887, and conviction under it would be rare."

Section 13 of the act of April 4, 1911 (Stats. 1911, p. 599), provides as follows: "It shall be unlawful for any person, . . . within the boundaries of any no-license territory to sell, furnish, distribute or give away any alcoholic liquors except as provided in section 16 hereof." (Nothing in said section 16 has reference to the facts in this case.) Plainly the rule applies in cases arising under this section, as it did in *People v. Pera*, which arose under the same statute though for a different offense.

This rule of law furnishes sufficient answer to defendant's points above designated as 1, 3, and 5. Dr. Gibson's testi-

mony, as we have seen, would have been addressed to the question of intent, as would testimony that defendant had knowledge, prior to the twenty-ninth day of May, 1917, that Mrs. Sisson was a spy, for the purpose of that testimony was to bolster up defendant's claim that he was playing a joke upon her and hence had no intention to violate the law.

As to instructions 1 and 5, they both in effect charged the jury that the intent to violate the law is implied upon proof beyond a reasonable doubt that the defendant sold to Mrs. Sisson at the time named, within the limits of the town of Alturas (admittedly no-license territory), alcoholic liquor, to wit, whisky containing more than one per cent of alcohol. A similar instruction in *People v. Pera, supra*, was given and was held to be a correct statement of the law.

The testimony that the bottle, with its contents, as it was sold and delivered to the prosecuting witness, was the same bottle, with the same contents, which was brought into court is not controverted; nor is there any evidence that the liquid in this bottle was other than whisky, and there was evidence that it contained fifteen per cent alcohol. The bottle was passed to the jury, who were, without objection, "permitted to smell the contents and taste it if they desire." The jury examined the bottle, but it does not appear that they drank any of the contents. Defendant offered no evidence that the contents were not whisky.

As to defendant's second point, he says in his brief that "the only point in dispute between prosecution and defendant was, What was the character of the liquid delivered to Mrs. Sisson?" The contention is that under paragraph 9, section 1870, of the Code of Civil Procedure, only one who "is skilled therein" can give "his opinion on a question of science, art, or trade." Witness Estes concededly did not testify as an expert. He testified, however, that he was familiar with the taste of whisky and had drunk of different brands; that he could distinguish between the taste of whisky and brandy, and his opinion was quite emphatically given that the bottle in question contained whisky.

In the case of *People v. Monteith*, 73 Cal. 9, [14 Pac. 373], a nonexpert witness was permitted to testify that a person at a given time was intoxicated, the court saying: "Drunkenness is, unfortunately, of such common occurrence, that it does not require an expert to pronounce upon it. We think the

case falls within the principle of *People v. Sanford*, 43 Cal. 32, 33." Likewise we may safely say that the drinking of whisky is, unfortunately, of such common occurrence, that it does not require an expert to pronounce upon it. We do not think it was necessary for the people to have caused a chemical analysis of this liquid to be made, but that it was competent to establish *prima facie* that the liquid in question was whisky by the opinion of persons who were accustomed to the use of whisky. The way was open to defendant to rebut this evidence either by causing an analysis to be made of the liquid or by having other witnesses familiar with the taste of whisky to test it and give their opinion. He did neither, but rests wholly on the incompetency of the witness Estes to testify. We do not think the court erred in its ruling.

Appellant claims that the court erred in permitting Lulu Sisson and Mrs. Campbell to be corroborated by their notes taken of what occurred when defendant was at Mrs. Sisson's house. It appeared that after he had gone they entered in a memorandum-book what they remembered of the occurrence. After they had testified to the facts without consulting their memoranda or finding it necessary to do so, the district attorney, over objection, was allowed to introduce this book showing what these witnesses had written down therein. Substantially it agreed with their testimony. We think this was error. Under section 2047 of the Code of Civil Procedure, a witness may "refresh his memory respecting a fact, by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing." But where the witness can and does testify fully as to the facts without resort to his memorandum, we do not think he can be corroborated by the introduction of his memorandum. We think, however, that the ruling was without prejudice. Section 4½ of article VI of the constitution would seem to apply here.

The judgment and order are affirmed.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 2, 1918.

[Crim. No. 442. Third Appellate District.—May 9, 1918.]

In the Matter of the Application of LUTHER R. PERRY  
for a Writ of Habeas Corpus.

**PARENT AND CHILD—AWARD OF CUSTODY TO ONE PARENT—OTHER PARENT NOT LIABLE FOR SUPPORT.**—Where by a decree of divorce the custody of the minor children of the parties is awarded to one of the parents, without charging upon the other parent the support of such children, the parent to whose custody the children are so awarded is, under the terms of section 196 of the Civil Code, alone liable for their support, and the parent not entitled to the custody of the minors is relieved of that duty.

**ID.—OMISSION TO PROVIDE FOR MINOR CHILD—UNWARRANTED COMMITMENT.**—Where in an action for divorce the custody of the minor children of the parties was awarded to the mother, but no provision was made in the decree for their support, an order holding the husband to answer in the superior court for the alleged violation of section 270 of the Penal Code, and the commitment thereupon issued, are void and of no legal force.

**APPLICATION** for a Writ of Habeas Corpus originally made to the District Court of Appeal for the Third Appellate District.

The facts are stated in the opinion of the court.

Francis McInnis, for Petitioner.

Arthur Lindauer, for Respondent.

**HART, J.**—The petitioner alleges that he is illegally restrained of his liberty by the sheriff of Solano County, and makes this application to this court for a writ of *habeas corpus* to the end that he may be released from such unlawful restraint.

The petition for the writ alleges that on or about the fourth day of February, 1918, the petitioner was arrested on a warrant issued by one S. A. Cripps, justice of the peace of Elmira Township, in said county of Solano, upon a complaint charging petitioner with willfully omitting, without lawful excuse, to furnish his minor child, Henry Perry, with necessary food, clothing, shelter, etc. (Pen. Code, sec. 270); that upon said complaint the petitioner was given a preliminary



hearing, and thereupon held to trial in the superior court of said county upon said charge.

It is further alleged that, on the twenty-eighth day of April, 1915, the superior court of the said county of Solano, in an action between the petitioner as defendant and his wife, Grace Perry, as plaintiff, made and entered an interlocutory decree of divorce, wherein and whereby said Grace Perry was adjudged to be entitled to a divorce from petitioner, upon the ground of desertion; that said decree provided, among other things, that the custody and control of the minor children of petitioner and said Grace Perry, to wit, Robert Winchell Perry and Henry Arthur Perry, be awarded to said Grace Perry; that said interlocutory decree of divorce so rendered and entered in said action made no provision whatever for any support of said children; that thereafter, to wit, on the fourth day of May, 1916, the said superior court of the county of Solano rendered and caused to be entered its final decree of divorce, wherein and whereby all the terms of said interlocutory decree "in regard to the custody and control of said minor children were confirmed and ratified"; that "said interlocutory decree of divorce and said final decree of divorce have never been altered or modified in any respect whatsoever, and still are in full force and effect as rendered and entered; that there have never been any proceedings brought under sections 138 and 139 of the Civil Code to require said Luther R. Perry to contribute to the children's support."

Attached to and made a part of the petition is the judgment-roll in the said divorce action.

The sheriff, in his return to the alternative writ, answers: 1. That he holds the petitioner "under and by virtue of his violation of the 'order suspending the imposing of sentence and releasing the defendant (petitioner) on probation,' made by the superior court . . . in and for the county of Solano, on the seventeenth day of July, 1914"; 2. That, further, he holds petitioner by "virtue of a commitment issued by the Hon. S. A. Cripps, justice of the peace of Elmira township, county of Solano, . . . on the fifteenth day of March, 1918, holding to answer upon a charge of failure to provide for his minor child, Henry Perry, the within named defendant (petitioner), Luther R. Perry."

The first of the above-stated grounds upon which the sheriff undertakes to justify the restraint of the petitioner constitutes the basis for the application to this court for the writ of mandate in the case of *People v. O'Donnell*, *post*, p. 192, [174 Pac. 102]. In that case we have considered and determined, adversely to the position of the district attorney, the question which is involved in the first of the two grounds set forth in the return as the authority for the holding of the petitioner by the sheriff, whether the superior court exceeded its jurisdiction in dismissing the motion by the district attorney to set aside the order suspending the imposing of sentence. It follows, therefore, that there is left to us for determination herein the single question whether the restraint of the petitioner by the sheriff by virtue of the commitment issued by the justice of the peace on the fifteenth day of March, 1918, holding petitioner to trial for violating the provisions of section 270 of the Penal Code, is legally justifiable.

The reply to the question thus propounded is not, in view of the many adjudications of the proposition involved therein in California, fraught with serious difficulty.

It has frequently been held that where, by a decree of divorce, the custody of the minor children of the parties is awarded to one of the parents, without charging upon the other parent the support of such children, the parent to whose custody the children are so awarded is, under the terms of section 196 of the Civil Code, alone liable for their support, and the parent not entitled to the custody of the minors is relieved of that duty. (See *Matter of McMullin*, 164 Cal. 504, [129 Pac. 773]; *Lewis v. Lewis*, 174 Cal. 336, 340, [163 Pac. 42]). In *Lewis v. Lewis*, *supra*, the McMullin case is stated as follows: "The petitioner had been held for trial for an alleged violation of the same section (section 270) of the Penal Code. There the wife had obtained a divorce in the state of Nevada. The decree granted her the custody of the minor child and required the petitioner to pay for its support. But since there had been no personal service of summons, the Nevada court had no jurisdiction to impose upon him liability to make such payment. The result, as this court viewed it, was that the custody and control of the child had been given to the mother, without charging upon the father its support. 'Under section 196 of the Civil Code,' says the opinion, 'this situation *prima facie* relieves the husband of

the duty of support and casts it on the wife.' The petitioner was discharged from custody."

In *People v. Schlott*, 162 Cal. 347, [122 Pac. 846], the conviction of the defendant under section 270 of the Penal Code was sustained, but in that case it appeared that the decree of divorce required the defendant to pay to his wife the sum of fifty dollars per month for the support of herself *and child*, and the defendant failed to make the payments so required.

In the present case, as we have seen, the decree in the action for divorce between petitioner and his wife awarded the custody of the minor children to the latter, but made no provision whatsoever for the support of said children by the petitioner. From this state of the facts and the cases above referred to, it necessarily results that the order of the magistrate of March 15, 1918, holding the petitioner for trial in the superior court for the alleged violation of section 270 of the Penal Code, and the commitment thereupon issued, are void and of no legal force, and that the sheriff is consequently without legal warrant for holding the petitioner, so far as said commitment is concerned.

From the foregoing and the conclusion arrived at and announced in the case of *People v. O'Donnell*, *supra*, it follows that there is no legal justification for the holding of the petitioner by the respondent, sheriff, and the prisoner is, therefore, discharged from the custody of said respondent.

Chipman, P. J., and Burnett, J., concurred.

---

[Civ. No. 1852. Third Appellate District.—May 9, 1918.]

THE PEOPLE, etc., Petitioner, v. Hon. W. T. O'DONNELL,  
Judge of the Superior Court of Solano County, Respondent.

**CRIMINAL LAW—SUSPENSION OF SENTENCE—REVOCATION OF ORDER—ABSENCE FROM STATE—JURISDICTION.**—In a criminal action, the superior court is without jurisdiction to set aside an order suspending sentence and releasing the defendant on probation for violation of the order, where the probationary period has expired, since the

---

power to revoke or modify the order is limited to the period of probation, and the term of probation does not cease to run during the absence of the defendant from the state.

**APPLICATION** for a Writ of Mandate originally filed in the District Court of Appeal for the First Appellate District to require the Superior Court to accept and exercise jurisdiction of a certain proceeding.

The facts are stated in the opinion of the court.

U. S. Webb, Attorney-General, John H. Riordan, Deputy Attorney-General, and Arthur Lindauer, for Petitioner.

Francis McInnis, for Respondent.

**HART, J.**—This is an application for a writ of mandate to require the respondent to accept and exercise jurisdiction of a certain proceeding instituted by the petitioner, as district attorney of Solano County, in the court of which the respondent is the presiding judge.

The facts as gleaned from the petition are: That one Luther R. Perry, having previously to the seventeenth day of July, 1914, been by a magistrate of Solano County held for trial in the said superior court for failure to provide his minor children, with the common necessities of life (Pen. Code, sec. 270), was, on the day named, arraigned before said court upon an information charging him with that offense and thereupon pleaded guilty thereto; that thereupon the superior court, after due proceedings, made an order suspending the imposition of sentence and releasing the said Perry upon probation, upon certain specified conditions, for the period of three years; that thereafter the said Perry left the state of California and remained therefrom and beyond the jurisdiction of said court during the whole of said period of probation; that he violated the order of suspension of sentence and probation by leaving the state and by failing to comply at any time with any of the conditions of said order of suspension of sentence and probation; that, upon and after the expiration of the said period of probation, said Perry returned to the said county of Solano, this state, and was thereupon, at the instigation of the district attorney of said county, taken into custody by the sheriff of said county for violating said order of suspension

and probation and the conditions upon which said order was made; that thereafter the district attorney appeared before the said superior court and moved that the said order of suspension of sentence be set aside and sentence thereupon pronounced in said case; that the superior court refused to entertain the motion upon the ground that it was then without jurisdiction to take action in the premises, and accordingly dismissed the motion.

Attached to the petition and constituting a part thereof are the minutes of the court in both the proceeding wherein the court suspended the pronouncement of sentence and the proceeding in which the district attorney moved and sought to have the order suspending sentence set aside and sentence pronounced. The court stenographer's transcription of his report of the two proceedings is also annexed to the petition and made a part thereof.

While the minutes of the court in the proceedings wherein the district attorney pressed his motion to set aside the order of suspension of sentence and to have sentence pronounced merely show that the court, without expressing any reason therefor, dismissed the motion, the reporter's notes disclose that the judge appeared to be of the opinion that, the probationary period having expired prior to the time at which the motion was instituted and made, the court had been divested of further jurisdiction of the case, and was, therefore, without legal authority to take any further action therein.

It is contended here by the attorney for the respondent that the court had jurisdiction to dismiss the motion and that the ground of the order of dismissal is of no consequence; that even if the reason for the dismissal was erroneous in a legal view, still the court's jurisdiction to dismiss the motion cannot be challenged through a writ of any kind. It is further contended that in no event will mandate lie to compel a court to accept jurisdiction of a proceeding or action.

Obviously, under the general rule, a court has jurisdiction to dismiss any proceeding before it, and whether its action in doing so is founded on a sound or an unsound reason, legally, would not be inquired into by a court of appeal except in a proceeding appropriate to the review and correction of error. Assuming, however, that the court, in this case, as the reporter's notes of the proceeding show, refused to entertain the motion for the sole reason that it had lost jurisdiction of the

action and that that fact is in a proper way made to appear before us, and assuming further that as a legal proposition the court had not lost jurisdiction of the case, then the further question would arise whether the court may not be compelled, by mandate, to entertain and consider and determine the motion on its merits—that is, the question whether it should or should not be allowed—since there appears to be in such case no “plain, speedy, and adequate remedy in the ordinary course of law,” there appearing to be no appeal from such an order of dismissal provided for. But this question we need not decide here, for we are of the opinion that, the motion having been instituted and pressed to the attention of the court after the period of probation had expired, the court, therefore, lost jurisdiction of the case and was without legal authority for granting the motion.

First, it is important to note that it is clear from the record before us that the court, in suspending sentence and admitting Perry to probation, acted under section 1203 of the Penal Code rather than under section 270b of said code, although the latter section appears to have been intended to have special application to cases arising under either section 270 or 270a of the Penal Code. Section 270b provides for the suspension of sentence in such cases upon the filing by the defendant of an undertaking, valid and binding for the period of six months only, and conditioned for the payment of such monthly sum as the court may fix for the support of either the minor children or the wife, as the case may be, during the time that such undertaking shall run. The section further provides that, upon the failure of the defendant to comply with the undertaking, he may be ordered to appear before the court and show cause why further proceedings should not be had in the action, or why sentence should not be pronounced, and the court is then authorized to pronounce sentence or modify the order or take a new undertaking and further suspend proceedings on sentence “for a like period.”

Section 1203 of the Penal Code clothes the court with the authority of admitting any person over the age of eighteen years, who has pleaded guilty to or been convicted of any crime, to probation upon certain specified conditions. The court is by said section empowered to suspend the imposition or execution of sentence and may direct that such suspension may continue for a period of time not exceeding the maximum

possible term of such sentence, except where the offense consists of a violation of section 270 or 270a of said code, in either of which cases such suspension of imposition or execution of sentence may, in the discretion of the court, continue for not over five years. The court may also, when acting under said section, require the defendant to give a bond for his appearance before the court at any time such appearance may be required for the purpose of investigating any alleged violation of the terms and conditions of probation.

In this case, no undertaking, as required by section 270b, was taken, nor, so far as the record here discloses, was any bond given and filed by the defendant, as required by section 1203. So far as the record before us shows, the court merely suspended the imposition of sentence and admitted the defendant to probation for the term of three years upon certain prescribed conditions. It is, therefore, evident, as above stated, that the proceeding was the one authorized by section 1203 and not the one authorized by section 270b.

Returning, now, to the proposition that the court had lost jurisdiction of the action, and, therefore, was without legal authority for entertaining or acting upon the motion, except to dismiss it, attention should first be directed to the language of subdivision 4 of section 1203, which is as follows: "The court shall have power at any time *during the term of probation* to revoke or modify its order of suspension, of imposition or execution of sentence. It may, at any time, when the ends of justice will be subserved thereby, and when the good conduct and reform of the person so held on probation shall warrant it, terminate the period of probation and discharge the person so held, and in all cases, if the court has not seen fit to revoke the order of probation and impose sentence or pronounce judgment, the defendant shall, at the end of the term of probation, be by the court discharged."

We think that these two propositions are clearly deducible from the language of said section 1203, viz.: 1. That the court may, whether the defendant be present in or absent from court at the time, revoke the order suspending the imposition of sentence or the execution thereof and admitting him to probation, upon a sufficient showing that he has violated any of the terms and conditions upon which such order was made; 2. That, under the provisions of subdivision 4 of said section, the court loses jurisdiction or power to make an order revok-

ing or modifying the order suspending the imposition of sentence or the execution thereof and admitting the defendant to probation after the probationary period has expired.

As to the soundness of the last stated proposition there can be no possible doubt. It is necessarily implied from the initial language of subdivision 4 of said section. The authority in a court to suspend a sentence or the execution thereof in a criminal case and liberating the defendant for a certain period is wholly statutory, and the statute itself furnishes the measure of the power which may thus be exercised. Nothing which cannot be found in the statute or which is not reasonably and fairly or necessarily within the reason or spirit or intent thereof can be imported into it by the courts. When, therefore, the legislature says, as it has said, that the order of suspension and probation may be revoked or modified *during the term of probation*, without adding language so qualifying that provision as to justify the construction that the time when such revocation or modification may be made is extended beyond the term or period of probation, the necessary implication is that it was the legislative intention not to confer upon the court the right to exercise that power after the time at which the period of probation has expired. Indeed, this view of subdivision 4 of the statute in question follows from a consideration of its language by the light of the familiar statutory rule of construction, *expressio unius est exclusio alterius*.

But the district attorney contends that, Perry having left the state and so placed himself beyond the jurisdiction of the court, and remained therefrom until after his term of probation had expired, the said term of probation, by analogy to the rule in this state with respect to the statute of limitations as applied to the finding of indictments and the filing of informations in criminal cases (Pen. Code, sec. 802), ceased to run while he was absent from the state. We cannot agree to that contention. While the rule in this state, unlike that of the common law, is that penal statutes are not to be strictly construed, but are to be given such construction as will comport with the fair import of their terms, with a view to effect their objects and to promote justice (Pen. Code, sec. 4), yet where certain powers are conferred upon a court or other tribunal wholly by statute, the nature and extent of such powers must be ascertained and determined from the language of the



statute itself. As above stated and as our law declares (Code Civ. Proc., sec. 1858), nothing can be added to or taken from a statute in construing and applying it. The statute in question here itself fixes and limits the time within which an order suspending sentence or the execution of a sentence already imposed may be set aside or modified. It in no way qualifies the provision as to the time when such an order may be made. Neither in said statute nor in any other law of this state to which our attention has been called is there any provision that the term of probation shall cease to run during the absence of the defendant from the state while such order remains alive. In the absence of such a provision, it must be held that the term of probation continued unbroken until it reached the end of the time to which it was expressly limited. Clearly, section 802 of the Penal Code cannot be made to apply to a case of this character. It is plain that it does not directly apply, and we cannot perceive how it may reasonably be made to do so by analogy.

In this case, the terms and conditions upon which the court suspended the imposition of sentence and admitted the defendant to probation were these: 1. That he pay to the probation officer of the county a certain sum each month for the support of his two minor children; 2. That he, during the term of probation, refrain from using intoxicating liquors and from visiting saloons or other places where such liquors are kept for sale; 3. That he report in writing every two weeks to the probation officer his whereabouts, occupation, and earnings, "and shall not leave or absent himself from the state of California without first obtaining written permission from the district attorney of said county." It is further provided that violation of any of the terms and conditions of said order "shall be and is hereby made cause for the revocation hereof."

Thus it appears that the violation of any one or all of said terms of probation is expressly made a sufficient cause for the revocation of the order of probation, and the statute (subdivision 9, section 1203, *supra*), makes it the duty of the probation officer of the county to report to the court any such violation. The defendant in this case, when he left the state and failed to make the payments required for the support of his minor children, was guilty of a violation of at least two of the conditions upon which he was released on probation. Of such violation, the probation officer was fully cognizant, and

had he reported it to the court, the order admitting him to probation could have been nullified, or whether set aside or not while Perry was out of the state, steps could have been taken to apprehend the prisoner, who in either case then would in law have been an escape and a fugitive from justice. But the record here does not show that any report of the default of the defendant in complying with the terms of his release on probation was ever, at any time, made to the court, nor that any further proceedings were taken in the case until after the term of probation had expired.

Our conclusion is, as above stated, that the court was without jurisdiction to entertain the motion to set aside the order suspending the imposition of sentence and admitting the defendant in the action to probation, and the alternative writ of mandate is accordingly discharged and the proceeding herein dismissed.

Chipman, P. J., and Burnett, J., concurred.

---

[Civ. No. 2267. Second Appellate District.—May 10, 1918.]

NELLIE PITT, Respondent, v. J. H. PENSINGER,  
Appellant.

**APPEAL—JUDGMENT—ALTERNATIVE METHOD—PRINTING OF RECORD IN BRIEFS.**—On an appeal taken from a judgment, where the record is prepared under the alternative method, the parties must, under section 953c of the Code of Civil Procedure, print in their briefs such portions of the record as they desire to call to the attention of the appellate court, and where they fail to do so, the reviewing court will not look into the typewritten transcript to ascertain whether the points urged as ground for reversal are well made.

**APPEAL** from a judgment of the Superior Court of Kern County. Milton T. Farmer, Judge.

The facts are stated in the opinion of the court.

E. J. Emmons, and H. E. Johnstone, for Appellant.

T. F. Allen, for Respondent.

**THE COURT.**—The appeal in this case is taken from a judgment entered in favor of the plaintiff. The appellant in the preparation of his record on appeal has made use of what is known as the alternative method. However, in the preparation of the brief of appellant the provisions of section 953c of the Code of Civil Procedure have not been observed. By that statute it is required that the parties shall print in their briefs such portions of the record as they desire to call to the attention of the appellate court. Where they fail to do this it follows that the appellate tribunal will not look into the typewritten transcript to ascertain whether the points urged as ground for reversal are well made. The brief here presented on behalf of appellant does not contain sufficient of the record in printed form to enable us to say that there is any merit in the appeal. This same question has been considered in a number of cases which are cited in *Barker Bros. v. Joos*, 36 Cal. App. 311, [171 Pac. 1085]. For want of any showing of error, it follows that the judgment appealed from should be affirmed.

The judgment appealed from is affirmed.

---

[Civ. No. 2389. First Appellate District.—May 10, 1918.]

ELIZABETH A. CORBETT, Appellant, v. GUS SPANOS  
et al., Respondents.

**NEGLIGENCE—INJURY TO CUSTOMER IN STORE—LIABILITY OF PROPRIETOR—**

**BURDEN OF PROOF.**—In an action by a customer against a store-keeper for personal injuries in stepping into an open trap-door in the rear of the store, upon leaving the toilet used only by employees, the burden is upon the customer to show the breach by the defendant of a duty owing to her.

**ID.—DUTY OF STORE PROPRIETOR TO CUSTOMER.**—The keeper of a public place of business is bound to keep his premises and the passageways to and from it in safe condition, and use ordinary care to avoid accidents or injury to those properly entering upon his premises on business; but this rule only applies to such parts of the building as are a part of or used to gain access to, or constitute a passageway to and from the business portion of the building, and not to such parts of the building as are used for the private purposes of the owner, unless the party injured has been induced

by the invitation or allurements of the owner, express or implied, to enter therein.

**ID.—USE OF EMPLOYEES' TOILET—EVIDENCE—INFERENCE OF GENERAL INVITATION OR INDUCEMENT.**—An inference of a general invitation or inducement by the proprietor of a store to use the employees' toilet in the rear of the store cannot be legitimately drawn from the single instance of its use by a customer by permission of one of the employees.

**ID.—DUTY OF STOREKEEPER TO LICENSEE.**—The only duty of a proprietor of a store to a mere licensee, when in that portion of the premises not customarily used by the public, and to which the licensee is not expressly or impliedly invited, is to avoid doing any willful or wanton injury to such licensee.

**ID.—VIOLATION OF ORDINANCE—NEGLIGENCE—CUSTOMER NOT WITHIN PROTECTIVE TERMS.**—The violation by a storekeeper of an ordinance prohibiting for fire protection covering of stairways with permanent flooring is not negligence as to customer injured by falling through trap-door in flooring, since she does not come within the class the ordinance was designed to protect.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. John Hunt, Judge.

The facts are stated in the opinion of the court.

Louis Ferrari, for Appellant.

Wm. M. Abbott, Wm. M. Cannon, and Kingsley Cannon, for Respondents.

**ZOOK, Acting P. J., pro tem.**—This is an action for damages for physical injuries alleged to have been sustained by plaintiff through the negligence of defendants. Plaintiff appeals from a judgment for defendants entered upon an instructed verdict in their favor at the close of plaintiff's evidence. The facts testified to were as follows: Defendant Spanos conducted a candy and light lunch business in a store owned by defendants Whitney and Wilson, where plaintiff was accustomed to take lunch. In the rear of the store there was a partition running across the width of the store, with a door in the center opening into a narrow and rather dark passageway, on the opposite side of which there was a room containing a toilet and wash-basin for the use of the young women employed in the store. There was a trap-door in the passageway with a flight of stairs leading down to the base-

ment where candy was made and stored. This stairway was frequently used by the employees when they wished to bring candy up from the basement. On the day of the accident plaintiff, having lunched at the store, asked one of the attendants if there was a dressing-room, and was shown to the toilet in question. The trap-door was closed at the time, and as it fitted flush with the floor, there was nothing to indicate its existence to plaintiff, and she received no warning about it. While plaintiff was in the toilet some person whose identity was not shown on the trial, but presumably an employee of the store, lifted the trap-door and left it open. When plaintiff attempted to return to the outer store she did not notice the open trap-door, but in opening the partition door, which swung toward her, she stepped backward and through the trap-door and fell down the steps to the basement below.

We are of the opinion that the lower court correctly instructed the jury to bring in a verdict for the defendants upon the facts above set forth. While plaintiff was undoubtedly seriously injured by the fall, she could only recover damages therefor upon showing some breach by the defendants of a duty owing to her, and this she has failed to do. The law of California as to the duties owing by a proprietor of a store to his customers and to the public is settled by the cases of *Schmidt v. Bauer*, 80 Cal. 565, [5 L. R. A. 580, 22 Pac. 256]; *Means v. Southern California Ry. Co.*, 144 Cal. 473, [1 Ann. Cas. 206, 77 Pac. 1001]; *Herzog v. Hemphill*, 7 Cal. App. 116, [93 Pac. 899]. It is well expressed in the following quotation from *Schmidt v. Bauer*, *supra*: "The keeper of a public place of business is bound to keep his premises and the passageways to and from it in safe condition, and use ordinary care to avoid accidents or injury to those properly entering upon his premises on business. But this rule only applies to such parts of the building as are a part of or used to gain access to, or constitute a passageway to and from, the business portion of the building, and not to such parts of the building as are used for the private purposes of the owner, unless the party injured has been induced by the invitation or allurement of the owner, express or implied, to enter therein." While in the complaint in the case at bar it was alleged that the so-called dressing-room was placed by the defendant Spanos at the disposal of his customers and as an inducement to have customers patronize his business, abso-

lutely no evidence to support of this allegation was produced at the trial except the fact that, on the single occasion when plaintiff was injured, she was shown to it by an attendant in response to her query as to whether or not there was a dressing-room in the place. It affirmatively appeared in the evidence that there was no sign on the door to the passageway leading to the toilet in question to indicate that there was a dressing-room there for the use of customers, and the simple equipment of the room itself, as well as its situation in a poorly lighted passageway, negatives the idea that it was intended for the use of anyone other than Spanos' employees. The attendant who showed plaintiff the way was not called to testify upon the trial, and no authority in her to permit the use of the room by the patrons of the place was shown. In the absence of such showing, no inference of a general invitation or inducement by the proprietor of the store such as is alleged in the complaint can be legitimately drawn from this single instance of its use by permission of his servant. The only duty of a proprietor of a store to a mere licensee, when in that portion of the premises not customarily used by the public, and to which the licensee is not expressly or impliedly invited, is to avoid doing any willful or wanton injury to such licensee, and no such injury is shown by the record in the case at bar.

It is also claimed by the plaintiff that the trap-door and stairway were constructed and maintained by both Spanos and the owners of the building in violation of the provisions of a certain ordinance of the city and county of San Francisco which provides as follows: "Stairs or stairways passing from one floor to another in any building shall not be covered with a permanent flooring, but may be closed with a board partition extending from the floor to the ceiling, and provided with a door, which must be kept free from all obstruction at all times, so as to give to the fire department and fire patrol, easy access from one floor to another, provided this section shall not apply to buildings used for public assemblages.

"Goods or obstructions of any kind shall not be placed on the stairs of any building.

"Explosive or inflammable compounds or combustible materials, shall not be stored or placed under any stairway of any building, or used in any such place or manner as to obstruct or render egress hazardous in case of fire."

It is very doubtful whether or not this trap-door, which could be easily opened and shut, comes within the prohibition of the ordinance as to covering stairs "with a permanent flooring," but it is unnecessary to decide the point here. The ordinance is purely a fire protection measure, designed to enable the fire department to have unobstructed access from one floor of a building to another in case of fire, and it is manifestly not intended to provide for the protection of the general public from injury. Therefore, conceding the ordinance to have been violated, plaintiff cannot claim that such violation constituted negligence, because she does not come within any class of persons which the ordinance was designed to protect. (*Toomey v. Southern Pacific R. R. Co.*, 86 Cal. 374, [10 L. R. A. 139, 24 Pac. 1074].) As is said in the article on Negligence in 29 Cyc., at page 438: "The violation of a statute or ordinance designed to protect persons entitled to be on premises will not constitute negligence as to mere licensees or trespassers to whom no duty is owed independently of the statute." In view of this principle, the alleged violation of the ordinance cannot operate to create liability on the part of either owners or proprietor.

Judgment affirmed.

Kerrigan, J., and Beasley, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court after judgment in the district court of appeal, was denied by the supreme court on July 8, 1918.

---

[Civ. No. 1831. Third Appellate District.—May 11, 1918.]

**META STEPHENS TURMAN et al., Plaintiffs and Appellants, v. JOHN F. ELLISON, Administrator, etc., et al., Defendants and Respondents; LEONARD LEMUS KLEMMER, Defendant and Appellant.**

**PAROL TRUST IN REAL PROPERTY—EVIDENCE.**—In an action to establish a parol trust in real property, the testimony of the plaintiffs without corroboration is sufficient to warrant a judgment in their favor.

**ID.—CHARACTER OF EVIDENCE.**—In order to prove a trust in real property by parol under a deed absolute in its terms, the evidence must be clear, satisfactory, and convincing.

**ID.—QUESTION FOR TRIAL COURT—APPEAL.**—The determination of the sufficiency of evidence to establish a trust in real property is for the trial court, and the same will be accepted as conclusive by the appellate court.

**ID.—FINDINGS SUPPORTED BY EVIDENCE.**—In this action to have it declared that defendants were holding certain real property in trust for the plaintiffs under a conveyance absolute in its terms, it is held that the findings against the existence of the trust are supported by the evidence.

**APPEAL** from a judgment of the Superior Court of Glenn County. Wm. M. Finch, Judge.

The facts are stated in the opinion of the court.

Chas. L. Donohoe, Glenn West, and W. T. Belieu, for Appellants.

Frank Freeman, for Respondents.

**BURNETT, J.**—The case has been exhaustively argued, although no novel proposition of law is involved. Indeed, the legal principles so ably discussed by counsel have been frequently considered by eminent jurists throughout the country and it would be idle to attempt in this opinion to add to the learning upon the subject. It is doubtful even if any specific statement of the facts can be of any value to the profession, and we might content ourselves with the declaration that the findings of the court are supported, and therefore the judgment must be affirmed.

However, it may not be amiss to call attention to some of the circumstances that justify the conclusion of the learned trial judge. In April, 1907, Dr. L. P. Tooley was living with his wife, Martha L. Tooley, in Willows, the county seat of Glenn County. Being ill, and believing that he would not recover, he determined to dispose of his property. He sent for his attorney, Judge Frank Moody, and after a conference with him he decided to make a transfer of all his property, real and personal, to his said wife. Thereupon, a deed, absolute in form, was made to her of the real estate, and a bill of sale of the personal property. In May, 1907, the doctor



died, leaving as his heirs his widow; Logan M. Tooley, the daughter of himself and said Martha L. Tooley; and the two plaintiffs in this action, daughters of a former marriage. The deed and bill of sale were placed on record by said widow, who continued in the use and possession of said property until her death on the twelfth day of February, 1913. She left a holographic will as follows:

"I give all my property at my death to my daughter, Logan Mattie Tooley, if at her death she has neither husband or children. I desire any property that may be left divided equally among my sisters and brother."

This will was admitted to probate, and on request of said Logan Mattie Tooley, John F. Ellison was appointed administrator with the will annexed and proceeded with the administration of said estate. Prior to the distribution of said estate, Logan M. Tooley died, leaving a will in which she devised all her property, except a small bequest, to one Lemus L. Klemmer. At the request of the latter, the plaintiff, Meta Stephens Turman, had said will admitted to probate and herself appointed administratrix with the will annexed.

In February, 1914, the said John F. Ellison filed his final account as such administrator and petitioned for the distribution of the residue of the estate of said Martha L. Tooley to the brother and sisters of said deceased, alleging that said Logan M. Tooley had died unmarried and without any surviving child. Said Meta Stephens Turman filed a verified written objection to this petition, claiming that the second clause of said will of Martha L. Tooley was void, that said property had passed absolutely to the daughter, Logan M. Tooley, and asked that it be distributed to her estate. In this opposition Klemmer joined. The lower court construed the will in accordance with the contention of said contestants, but the supreme court reversed said decision, holding that said second clause of the will was operative and that the residue of the property should be distributed to said brother and sisters of Martha Tooley. (*Estate of Tooley*, 170 Cal. 164, [Ann. Cas. 1917B, 516, 149 Pac. 574].)

It is under this will that the defendants claim the property. Said decision of the supreme court was filed in the superior court of Glenn County on June 12, 1915, and four days thereafter this suit was brought by plaintiffs to have it declared that said defendants are holding said property in trust for the

two plaintiffs and for the defendant Klemmer, as devisee of said Logan M. Tooley.

This claim is based upon the allegations of the complaint that there was an oral agreement on the part of Dr. Tooley, his wife, and the two plaintiffs providing that he should deed all his property to his wife and that plaintiffs would cause her no trouble during her lifetime; that at her death she would convey the residue of said property to the plaintiffs and said Logan M. Tooley; that by reason of this agreement he executed the said conveyance to his wife, and after his death she repudiated and violated said agreement and made said will as aforesaid. Certain questions of fact were submitted to a jury and they found in favor of the position of plaintiffs, but the trial court did not adopt the jury's view, but concluded that "said L. P. Tooley did transfer all his property, both real and personal, to his wife unconditionally, in fee simple to have and to hold to her and her heirs and assigns forever and without any condition or limitation."

We may concede that the complaint states a cause of action, that it sets up a trust that could be legally enforced by a court of equity, and what is more to the point of controversy, that there is evidence in the record which would support a finding and judgment in favor of plaintiffs.

To make manifest the latter statement we may refer to and quote from the testimony of Meta Stephens Turman. She said that shortly before her father died—probably two weeks—a conversation took place at her father's house in his bedroom; that the persons present were the father, her sister, Cliffie I. Clarke, her half-sister, Logan Tooley Clark, and her stepmother, Martha L. Tooley.

"When we went into the room I stepped up to the bed and asked my father how he was. I knew he was very low, and he said he was glad we had come to see him because he wanted to talk to us, and he turned to my stepmother, and says, 'Mattie, I wish you would tell Logan to come in the room.' And when Logan came in the room he said, 'I wish to tell you girls how I am going to leave the property; and we told him not to talk, because he was very low and could only say one word at a time, and my stepmother told him not to talk, and he said he must. He says, 'I want to explain how I am going to leave the property.' He says, 'One time I wanted to leave one thousand dollars to each of you girls of

the insurance' . . . a life insurance policy for one thousand dollars apiece for the girls, and he was going to change that and put it in Mrs. Tooley's name as well as all the other property, and that he had told Judge Moody to fix up the papers to that effect, because she promised him if he did put all the property in her name and she used it all her life that at her death she would divide what was left between us three girls, and he says, 'Didn't you promise me that?' and she says, 'Yes, I did,' and he says, 'You have heard the promise and I don't want you to bring any lawsuit, or create any trouble;' and I gave my promise and my sister didn't say anything, and I did for her, because she promised to divide at her death, and I promised we wouldn't bring any suit against it. And then papa went on to say that she was old and after he died she wouldn't have anyone to provide for her, and we were married and had husbands, and he told her to give us girls one hundred dollars apiece and Logan twenty-five dollars after his death—that that was a gift to us girls. And that was all that was said right there. We were all crying and my father—it was with the greatest effort that he explained anything at all to us."

Nor was it necessary for plaintiffs to corroborate the testimony in order to warrant a finding in their favor. The legislature has provided that "the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact except perjury and treason." The present case is not within the exceptions; therefore, respondents are in error in contending that the burden was upon plaintiffs to introduce more than their own testimony in order to legally entitle them to prevail in the action. There are some decisions from other jurisdictions that seem to hold to such view but such is not the law in this state.

It is true, though, that the evidence to show that a deed is not what it purports to be, that notwithstanding its absolute terms the grantee holds subject to a parol trust, should be *clear, satisfactory, and convincing*. (*Bollinger v. Bollinger*, 154 Cal. 695, [99 Pac. 196].)

But it is also true, as held in the *Bollinger* case and many others that might be cited, in fact, it follows from the scheme of our judicial procedure that the proper application of this rule, when there is substantial evidence to support the existence of a trust, must be left to the trial court, and its deter-

mination that such evidence is *clear, satisfactory, and convincing* will be accepted by the appellate court as conclusive.

It is likewise the law that although one witness, or more, may testify positively to facts constituting a trust and directly supporting the theory that the deed was not intended to be absolute as it purports to be, the trial judge is under no legal compulsion to find in accordance with such testimony. He must be convinced by it in order to warrant a judgment attaching any such condition to the solemn instrument executed by the parties. To his mind the evidence must be *clear, satisfactory, and convincing* in order to find a trust, but if he does not believe the witness is telling the truth, or if he is convinced that he is materially in error as to the terms of the declared trust, it is not only the privilege of said judge but it is his duty to reject such testimony and base his finding upon the presumption that follows from the execution of a deed absolute in form, that the grantor intended to vest the estate in the grantee unembarrassed by any secret trust or encumbrance.

The foregoing are mere truisms of the law and we need not cite authorities therefor. Nor is the proposition complicated by the fact that a jury may have found in accordance with the position of the one questioning the integrity of the deed. It is the chancellor who must be satisfied, and it is to his judgment and conscience that the matter must be submitted. In simple phrase, if A conveys to B an estate in absolute terms and C testifies that it was a trust, in an action to so charge the land, if the witness does not convince the trial judge that such trust was created, and the finding is in accordance with the presumption that arises from the instrument itself, it would be a reflection upon the honesty or capacity of the court below and an invasion of its province for an appellate court to set aside the judgment simply for the reason that the insensate record on appeal contains no affirmative evidence of the improbability of the testimony of the witness.

Besides, the record before us discloses certain considerations that confirm us in the belief that the learned trial judge did not decide arbitrarily against the claim of appellants and that their story was justly regarded with suspicion and distrust.

Indeed, it is true that actions to enforce oral agreements claimed to have been made with persons who are dead involve

a dangerous assault upon property rights, and they are often supported by false testimony and they naturally and reasonably excite suspicion. And while they may be genuine and worthy of confirmation, they require the closest and most careful scrutiny to prevent injustice being done. (*Wall's Appeal*, 111 Pa. St. 460, [56 Am. Rep. 288, 5 Atl. 220].) They afford and carry opportunity for fraud against the estates of deceased persons and a great temptation to perjury on the part of disappointed or avaricious relatives. (*Hinkle v. Sage*, 67 Ohio St. 256, [65 N. E. 999].) Such considerations could not be laid out of view by the trial judge.

He could not fail to observe, also, that the testimony of the plaintiffs was given nearly nine years after the transaction is said to have occurred. It is quite probable—even more than probable—that after the lapse of such a period the memory would be inaccurate as to the facts and conditions of the affair. It requires a good deal of courage and assurance for a witness to undertake under such circumstances to state definitely just what was said and done. If he does confidently make such attempt without ever having reduced the details to writing or having kept them vivid in his memory by frequent expression or recital of what took place, it is difficult to give full credit to his story. The distrust is naturally augmented by the circumstance that the testimony is not presented in any court until all the parties who could have any interest in contradicting it are dead. While we cannot say that under such circumstances it must necessarily be rejected as unworthy of belief, yet it must inevitably occur that the trial judge will regard it with serious misgivings. (*Mattingly v. Pennie*, 105 Cal. 514, [39 Pac. 200].)

In fact, it is proper to say that evidence given under such circumstances should not only be received with the greatest caution, but it has been declared to be evidence of the weakest and most unsatisfactory nature. (*Austin v. Wilcoxson*, 149 Cal. 24, [84 Pac. 417].)

Moreover, there are other substantial reasons disclosed by the record which appear amply sufficient to justify the action of the court in rejecting the testimony of the plaintiffs, some of which we will briefly state. The conduct of the plaintiffs in not asserting their claims and their attitude toward the will of Martha L. Tooley and of her daughter, Logan, are circumstances of moment. The fact that said Martha L.

Tooley in 1911 made a will devising all her property to her daughter Logan with the remainder over to the defendants, thus repudiating and violating an alleged solemn promise made to her husband in his dying hour is, at least, some evidence that no such promise was made. The presumption is that she was innocent of any such grievous wrong. (Section 1903 of the Code of Civil Procedure.) The will of the said daughter, also, is entirely inconsistent with her knowledge and recognition of any such trust.

Judge Moody's testimony, it may be added, is strongly opposed to plaintiffs' theory. He was the adviser of Dr. Tooley and drew the deed and bill of sale. He testified: "Dr. Tooley sent for me to come up to his house on business. I didn't know what he wanted until I reached there and he told me at that time, in the presence of Mrs. Tooley, that he wanted to dispose of his property and he wanted to give it to his wife. There was a good deal of conversation at that time, which all culminated in my advice to Dr. Tooley to make a deed and bill of sale to his wife to carry out the purpose which he stated to me at that time. . . . There were no conditions as to the making and delivery of the deed. Dr. Tooley requested Mrs. Tooley to give each of his two daughters, Mrs. Turman and Mrs. Clarke, one hundred dollars out of the insurance money when it should be collected."

He testified further that they had another meeting a day or two afterward when the deed was signed and acknowledged and furthermore, "There were no conditions upon which the deed was to be made. Dr. Tooley stated to me the reason he was doing that was that his two daughters had husbands who were capable of making them homes and all his wife had would be what he would leave her. All he had was made by Mrs. Tooley and himself: that they had practically nothing when they were married and that she had made as much of the money they had saved as he had. Mrs. Tooley, in answer to the doctor that he wanted his daughters to have one hundred dollars apiece, said she certainly would see that they got it, or words to that effect."

We must assume that the lower court gave full credit to the testimony of Judge Moody and that he was entitled to that consideration. Under the circumstances, it would seem quite improbable that if Dr. Tooley desired to charge the conveyance with the burden of a trust that he would not consult his

legal adviser in relation to it. It would occupy a large part of the conversation, as it involved a complicated question concerning which a layman would need information. It will not do to say that it was a private family affair which the doctor hesitated to discuss with his attorney. Why it should be considered more personal or sacred than the matters which he did mention, it is difficult to understand.

There is also the testimony of Mrs. Lizette Leddy relating to what the trial court was justified in believing was the same conversation by and through which plaintiffs claim the trust was created. She testified: "I walked into the bedroom and Dr. Tooley said, 'Well, here comes Liz'; that was a little nickname he had for me, and Mrs. Turman was on the bed, on her knees, imploring his forgiveness for something she had done, and she said, 'Oh, papa, papa, forgive me, papa, forgive me.' And he turned and said, 'I give all my property, real and personal, to my wife, Martha,' and she said, 'Oh, papa, we know.' And he said, 'Let me call the name, Martha L. Tooley.' He said, 'To Meta I give one hundred dollars; to Cliffie one hundred dollars and to Logan twenty-five dollars and forgive the debt.' And I stayed in the room quite a while and walked out and took my seat in the adjoining room, which was the dining-room, and you could have heard a pin drop. I never heard a sound."

She further testified that the plaintiffs soon went home. The foregoing is, of course, inconsistent with the position that a secret trust was created as claimed by appellant. It may be further stated that as to certain important matters which plaintiffs testified occurred within the knowledge and recollection of other eye-witnesses, the plaintiffs were contradicted by the other witnesses. This is pointed out in the brief of respondents and the testimony of Judge Ellison and Mrs. Ellison and Mrs. Leddy recited, but we need not repeat it.

It is contended that the trial judge adopted an erroneous theory in that he assumed that the conveyance of the property had already been executed when the promise in relation to the trust was made, and, therefore, he mistakenly concluded that said promise was not the inducement for the conveyance. However this may be, it is true that he found that there was no agreement whatever in relation to the property between Dr. Tooley and the plaintiffs, and this, of course, is sufficient to support the judgment.

The deed seems not to have been delivered to the grantee immediately on the day it was signed, and the conversation to which plaintiffs referred may have occurred after the deed was signed and before it was delivered. Thus it may be that the conveyance was not entirely completed until after said conversation. However, it is of no importance, as the learned trial judge was considering the case upon the assumption that the trust was attempted to be created; and whether he was right or wrong in his hypothetical view of the legal aspect of that situation does not affect the finding upon the other material question nor does it militate against the soundness of the judgment rendered.

The judgment is affirmed.

Chipman, P. J., and Hart, J., concurred.

---

[Crim. No. 710. First Appellate District.—May 13, 1918.]

THE PEOPLE, Respondent, v. EDWARD MARTIN,  
Appellant.

**CRIMINAL LAW—FAILURE TO FILE BRIEF OR APPEAR—DISMISSAL OF APPEAL.**—An appeal in a criminal case may properly be dismissed where the appellant fails to file a brief in support of his appeal, or to appear before the court on the date set for the argument thereof.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. George H. Cabaniss, Judge.

The facts are stated in the opinion of the court.

James W. Cochrane, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

**THE COURT.**—In this case the appellant failed to file a brief in support of his appeal, or to appear before the court on the date set for the argument thereof, and the appeal might properly have been dismissed upon that ground. We have,



however, carefully examined the record, and find that there was sufficient evidence to support the judgment, that the court fairly instructed the jury, and that there were no errors in the admission or rejection of evidence.

It is therefore ordered that the judgment and order be affirmed.

---

[Civ. No. 1850. First Appellate District.—May 13, 1918.]

M. FLEISHHACKER, Respondent, v. JAMES MORAN  
et al., Appellants.

LANDLORD AND TENANT—ACTION FOR RENT UNDER WRITTEN LEASE—  
LATENT DEFECT IN PREMISES AS DEFENSE—JUDGMENT ON PLEAD-  
INGS.—In an action for rent under a lease stipulating that the  
premises were in a good and tenable condition, judgment for  
plaintiff was properly given on the pleadings where the answer did  
not deny that the rent was due, but set up the existence of a latent  
defect unknown to the lessees at the time of the execution of the  
lease, without, however, any showing that the defect might not  
have been discovered, or any attempt to reform the lease on the  
ground of fraud or mistake.

APPEAL from a judgment of the Superior Court of the  
City and County of San Francisco. John Hunt, Judge.

The facts are stated in the opinion of the court.

Leon Samuels, and Joseph L. Taaffe, for Appellants.

Lilienthal, McKinstry & Raymond, for Respondents.

THE COURT.—In this action for rent, plaintiff leased cer-  
tain premises to the defendants, Moran and Nelson, to be used  
as a saloon, defendant Brewing Company being surety on the  
lease. One of the clauses of the lease reads as follows: "It is  
further agreed that the premises are now in a tenable and  
good condition, and are fit for the purposes for which they are  
hereby leased, and that they shall be kept in good condition by  
and at the expense of the lessees, during the term of this  
lease. . . ." The answer did not deny that the rent sued

for was due, but alleged the existence of a latent defect in the premises which was not known to the defendants at the time that the property was leased. There is absolutely no showing in the answer that the defect referred to might not have been discovered prior to the making of the stipulation above quoted, and there is no attempt in the pleadings to reframe the lease on the ground of mistake or fraud. Under these circumstances it is clear that the defendants are bound by their stipulation and that the lower court properly gave its judgment for plaintiff on the pleadings.

Judgment affirmed.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 11, 1918.

---

[Civ. No. 2393. First Appellate District.—May 13, 1918.]

JAMES D. SKELLY et al., Plaintiffs and Respondents, v.  
S. H. COWELL et al., Defendants and Appellants; E. N.  
TORELLO, Defendant and Respondent.

**WATER RIGHTS—PRESCRIPTIVE TITLE—BURDEN OF PROOF.**—In an action between riparian owners for the admeasurement of the waters of a creek, the burden of establishing all the elements of a prescriptive right rests upon the defendants claiming such rights.

**ID.—EVIDENCE—PRESCRIPTIVE RIGHT NOT ESTABLISHED.**—Use by a riparian owner of the waters of a creek is not such as to establish a prescriptive right where he used the water, or a large part of it, when he needed it, but not regularly, sometimes letting it go down the creek, and never using it in such a way as to deprive his neighbors lower on the stream of the use of it according to their rights.

**APPEAL** from a judgment of the Superior Court of San Mateo County. George H. Buck, Judge.

The facts are stated in the opinion of the court.

Mastick & Partridge, Peter F. Dunne, and W. I. Brobeck,  
for Appellants.

H. A. van C. Torchiana, for Plaintiffs and Respondents.

John F. Davis, and Ross & Ross, for Defendant and Respondent.

BEASLY, J., *pro tem.*—The parties to this action own lands riparian to Dennison Creek, a small stream rising on the western front of the Santa Cruz Mountains, in San Mateo County, and flowing westward through the lands of the parties to the ocean. The appellants' lands—which we will call the Cowell properties—lie below those of the respondent Torello and above those of the plaintiffs on the stream. The action was begun by plaintiffs and respondents John D., A. G., and Edward D. Skelly, Mrs. Skelly Therkoff, Mrs. Josephine Valencia, Debenedetti, and Deneri against the defendants Torello and the Cowells to have the waters of Dennison Creek admeasured between the parties according to their respective rights thereto as riparian proprietors.

The parties stipulated that the minimum flow of the stream was sixty-two miner's inches, and the court, basing its decision upon the respective riparian acreage capable of irrigation owned by each of the parties, adjudged that the Cowells have fourteen inches of this water, and divided the remaining forty-eight inches among the other parties.

The Cowells claim all the water in their pleadings, basing their claim upon prescription arising out of an adverse user, which they are asserted to have exercised for a period of fifteen years before the beginning of this action. The court found against this claim, and determined that during three years only preceding the action had the Cowells diverted more than their legitimate respective part of said water on to their said riparian lands. The court also found against the claim of the Cowells that their user of the water was open, notorious, continuous, and adverse. The question whether these findings are sustained by the evidence is the only question in this case. A statement of the Cowells' present contention makes this clear. They now contend that they are entitled, first, to eleven inches of the water by reason of their riparian rights, and, second, to a prescriptive title to twenty inches additional. Their claim to eleven inches as riparian owners is not disputed, and the court awarded them this part of the water in the judgment. Their claims of a prescriptive title are dis-

puted. The burden of establishing by evidence all the elements of a prescriptive right rests upon the Cowells, of course, and if they have not established such prescription by a preponderance of the evidence, then these findings must stand.

It is undisputed that during some fifteen years preceding the beginning of this action the Cowells and Henry Cowell, their predecessor in interest, maintained a bedrock dam in Dennison Creek by which water was diverted to the Cowell properties for use in irrigation. The witnesses on behalf of the Cowells testified varyingly that by means of this dam from one-half to three-quarters of the stream was taken out, and that the remainder of the water continued down the creek. One of them stated that at times all the water was taken. This water was not taken out continuously but was used when needed. On the other hand, James D. Skelly testified that for thirty-six years himself and his family had been using the water, and that during the year immediately preceding the beginning of the action there was a shortage of water due to the people above, Torello and the Cowells, using nearly all of it. Mrs. J. A. Valencia testified that for twenty-five years she had used water from the creek to irrigate her land, and that during only the year or two before she gave her testimony was there a shortage of water for her use. Debenedetti testified that he had been deprived of the water for three or four years, and before that had always had plenty of water. Other witnesses for the plaintiffs gave similar testimony, and some of the Cowell witnesses testified under cross-examination that Cowell used some of the water pretty much every month but not regularly; that sometimes he used it when he needed it, and sometimes he let it go down the creek. The fact seems to be that Henry Cowell used the water, or a large part of it, when he needed it, but never in such a way as to deprive his neighbors lower on the stream of the use of it according to their rights.

These facts above recited show no necessary conflict of the evidence in this case. It may be possible to so construe it as to make it appear to be conflicting, but a fair interpretation of the evidence, reading the whole voluminous record with care, discloses nothing that to the open mind is a contradiction in the facts to which the witnesses testify; nor do these facts establish the elements necessary to support a prescriptive right to this water in accordance with the contention of the Cowells.

There was nothing in the manner in which Henry Cowell used this water which would put his neighbors upon notice that he claimed to be using the water in such a way as to interfere with their rights. To be more specific, Cowell's conduct was not such as to indicate that he claimed all the water of this creek or fourteen or twenty miner's inches of it, continuously, and adversely to the rights of his riparian neighbors.

The facts above set forth would not have sustained, in our view, findings other than the findings which the court made upon them. Indeed, it seems to us, from a review of the circumstances of this case, that the able and experienced trial judge who heard it could not have reached a more equitable and just conclusion than that set forth in the judgment.

The judgment is affirmed.

Kerrigan, J., and Zook, J., *pro tem.*, concurred.

---

[Civ. No. 2285. Second Appellate District.—May 13, 1918.]

S. E. PULLIN, Respondent, v. W. S. ALLEN et al.,  
Appellants.

**ATTORNEY AND CLIENT—COLLECTION OF MONEY—RIGHT OF RETENTION  
PENDING DETERMINATION OF COMPENSATION—EVIDENCE—ACTION  
FOR CONVERSION.**—An action for conversion cannot be maintained against attorneys at law for a sum of money collected by them for a client where, under the facts of the case, the attorneys had the right to retain the possession of the money until it was legally ascertained that a reasonable compensation for their services amounted to a less sum than that collected.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Charles Monroe, Judge.

The facts are stated in the opinion of the court.

Frank P. Doherty, and Allen & Allen, for Appellants.

Courtney Lacey, and A. S. Bongiorno, for Respondent.

JAMES, J.—Defendants appeal from the judgment. The action was brought for the alleged conversion of the sum of five hundred dollars, which by the complaint it was asserted belonged to the plaintiff. The defendants made answer, first specifically denying the allegations of the complaint. It was then alleged that defendants had rendered professional services for the plaintiff to the reasonable value of the sum of five hundred dollars; that in the course of their employment the defendants came into possession of certain moneys and property as the result of the professional services rendered to said plaintiff, and that said defendants, after deducting their expenses, costs, and fees in the sum of five hundred dollars, delivered all of the remainder and residue of said moneys and property to the plaintiff. The undisputed evidence in the case showed that the defendants, as attorneys at law, were engaged by the plaintiff to attend to litigation already commenced as well as threatened against the plaintiff. That the services were rendered in a satisfactory manner, no dispute is made. A part of the services required of the defendants was to attempt the negotiation of the interests of the plaintiff in the furniture of a certain apartment house. After attending to the clearing up of certain mortgage liens against this property, defendants secured a purchaser for the interests of the plaintiff, and upon a sale of such interests received certain moneys into their hands in excess of the sum of five hundred dollars. After the work had all been completed defendants made return to the plaintiff of all moneys except the sum of five hundred dollars, which latter sum they retained, claiming the right so to do under the understanding had with the plaintiff that they were to receive a reasonable fee for their services. It seems to be indicated beyond all question that the agreement between the parties was that defendants should be paid out of the moneys in their hands for the services which they had rendered. It would seem to be immaterial, therefore, whether, as defendants assert, they possessed a lien upon the money independent of any agreement entitling them to retain such a sum as would reasonably compensate them for their work. Plaintiff in her testimony did not claim to have paid to the defendants any money in compensation for the services rendered, but only sought to show that the sum of five hundred dollars was an excessive amount to be allowed. After considerable of the services which defendants had been engaged

to perform were rendered, a conversation occurred between the plaintiff and one of the defendants relative to the fee to be charged. Plaintiff on that point testified that in conversation with Mr. W. S. Allen she then said: "Why, yes. I am going to give you one hundred dollars of it. He said, 'You do not think you are going to get off with one hundred dollars for me with all this work?' He said, 'You do not think you are going to give me one hundred dollars?' I said, 'Certainly I am going to give you one hundred dollars—I insist on giving you one hundred dollars.' 'Well,' he said, 'I won't take less than five hundred dollars, and I wouldn't do it again for one thousand dollars.' " The sister of the plaintiff, referring to the same conversation, testified as follows: "We were talking to Mr. Allen and I was sitting at my desk, and we were talking about the business and talking about the rebating. Then I said again, 'But, Mr. Allen, we are going to give you one hundred dollars out of this, and by the time we have paid up everybody, where does my sister come out.' " She added that Mr. Allen replied that he was going to charge \$500 for the work, and that she said, "You are just joking," and that he said, "I am not joking." It was after this conversation was had that the sale of the furniture interests was made and the proceeds collected by the defendants. As we have before noted, the matter of the right of the defendants to retain out of the money collected a reasonable fee was not questioned by the plaintiff. Conceding, as we think must be admitted, that under the facts of the case the defendants had the right to retain possession of the five hundred dollars until it was legally ascertained that a reasonable compensation for their services amounted to a less sum, then it must follow that until such ascertainment was had there would be no ground for the action of conversion. There could be no conversion while the right to retain the money existed. By the verdict of the jury the plaintiff was awarded judgment in the sum of \$250. Instructions were offered by the defendants and refused by the court, advising the jury of the essential matters necessary to make out a cause of action for conversion. We think that the defendants were entitled to have the offered instructions on these points given. They were also entitled to have an instruction, which was offered and refused by the court, given touching the matter of where the burden of proof rested in the action. The court did instruct the jury as to what was meant by the term "preponderance of the evi-

dence," but, so far as we can find from the transcript, gave no instruction at all as to the burden of proof being upon the plaintiff to establish her cause of action by such a preponderance of the proof. We do not think it was error to refuse offered instructions on the matter as to whether there was an agreement to pay the sum of five hundred dollars as compensation for defendants' services. Defendants base their right to have this instruction given upon the evidence showing the conversation had between defendant W. S. Allen and the plaintiff after a considerable part of the services for which compensation was claimed had been rendered. The argument is that as the defendants then stated that they would charge five hundred dollars for their services, because the plaintiff accepted further services in the same matter she would become bound to pay the amount claimed. We do not believe that the facts shown by that conversation are sufficient to make it appear that the plaintiff became bound as by agreement to pay the amount alleged. That conversation showed merely that the plaintiff and defendants were wide apart in their ideas as to what a reasonable compensation would be. The plaintiff asserted that she was going to pay one hundred dollars and the defendant W. S. Allen asserted that the charge would be five hundred dollars. The question of the amount of compensation was not there settled, but was left an open and disputed matter. The trial judge treated that question as being the only one in the case; for in his instruction to the jury he said: "The facts in this case are comprised in a very small compass. It is admitted that the defendants retained five hundred dollars. No complaint is made at all of their services in the way that any portion of the money was spent. It is claimed they retained five hundred dollars. It is admitted that they are entitled to some part of that on account of their services, and it is for you to determine what part they are entitled to, or whether or not they are entitled to all of it. That is all there is to this case." The remainder of the instructions given consisted principally of a statement of general rules for the guidance of the jury in arriving at a verdict. In the particulars which we have hereinbefore pointed out, we think that the charge was not as complete as the defendants were entitled to have given.

The judgment appealed from is reversed.

Conrey, P. J., and Works, J., *pro tem.*, concurred.



Civ. No. 2514. Second Appellate District.—May 13, 1918.]

R. M. BEKINS, Respondent, v. ELLA SMITH, etc.,  
Appellant.

**UNLAWFUL DETAINER—LANDLORD AND TENANT—EXISTENCE OF RELATION ESSENTIAL.**—The relation of landlord and tenant is a necessary prerequisite to an action for unlawful detainer under section 1159 of the Code of Civil Procedure.

**LIFE ESTATE—ORAL TRANSFER—WHEN EFFECTUAL.**—An oral transfer of a life estate in land may be made effectual by the taking possession of and the performance by the grantee of acts in reliance upon the grant.

**ID.—TERMINATION PRIOR TO DEATH OF LIFE TENANT.**—It is not essential to the creation of a valid life estate that there shall be no condition imposed which may terminate the estate in some contingency prior to the death of the grantee.

**ID.—USE OF LAND FOR RELIGIOUS PURPOSES—BREACH—REMEDY.**—An agreement of an owner of land to let another use the land as long as she should continue to conduct the same character of religious services as theretofore creates more than a mere tenancy at will, and in order to have the estate forfeited for breach of condition, it must be done in some proceeding other than that of unlawful detainer.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Fred H. Taft, Judge.

The facts are stated in the opinion of the court

R. D. McLaughlin, J. B. McLaughlin, and Earl Rogers, for Appellant.

Winslow P. Hyatt, and David G. Kling, for Respondent.

**JAMES, J.**—Plaintiff brought this action to recover possession of certain real property described in the complaint, alleging that the defendant unlawfully detained the same. In the complaint it was alleged that under the lease or agreement made between the parties the defendant occupied the relation of tenant at will toward the plaintiff. It was further alleged that the requisite notices required by the code had been given to terminate the tenancy. The answer filed by the defendant put in issue all of the material matters alleged in

the complaint. Findings and judgment were in favor of the plaintiff, from which judgment this appeal is taken.

The principal question presented is as to whether under the evidence submitted by the plaintiff, the relation of landlord and tenant was shown to have existed between the plaintiff and the appellant; or whether under such testimony it should necessarily be concluded that the appellant held a life interest in the real property, subject to be terminated only in certain contingencies. That the establishment of the relation of landlord and tenant between the parties is a necessary prerequisite to the prosecution of an action for the unlawful detainer of real property under the provisions of section 1159 et seq. of the Code of Civil Procedure seems not to be disputed. (*Johnson v. Chely*, 43 Cal. 299; *Richmond v. Superior Court*, 9 Cal. App. 62, [98 Pac. 57].) The real property in question was purchased by Martin Bekins, the father of the plaintiff, title being taken in the name of the plaintiff, no consideration appearing to have been paid by her. For the purposes of this action, Martin Bekins appears to be the real party at interest on the plaintiff's side of the case. Martin Bekins testified that he first met the defendant Ella Smith Trull at her residence in the city of Los Angeles, in November, 1913; that defendant was engaged in preaching the Christian gospel at that time; that he became interested in the services conducted by the defendant and offered to help purchase another piece of property in the city of Los Angeles for her use; that he went with the said defendant and two or three others to look at the property finally purchased. We now quote from the text of the testimony of this witness, as shown in the bill of exceptions: "A few days later I told the defendant I would purchase the property and give her the free use of it for so long as she conducted her services as she had been doing, and was doing at that time. I meant the religious meetings. I don't remember just what she said. She must have thanked me. A short time later I again stated my offer at Mr. Schultz's house. Later, at Mr. Preston's office, the defendant not being present, it was arranged that I pay, and I did pay the sum of three thousand five hundred dollars, and Mr. I. H. Preston put in a lot at five hundred dollars, which was the full purchase price of the property. The defendant went into possession at or about the time the lot was deeded to the plaintiff. She has remained in possession ever since. The

line of services conducted at her meetings at that time was much like other religious services. I did not attempt to establish an arbiter who should say that the religious services were or were not conducted as they had theretofore been. There was nothing further said than that as long as she conducted the services on the line that she had been conducting them and did not depart from it she could have the free use of it. In April or May, 1916, I attended some of the services where she said in public that she was going to give birth to a Christ on the third day of June at 5 o'clock. I think it was an immaculate conception, as she was long past the age she said." Witness I. H. Preston testified for the plaintiff as follows: "I met Martin Bekins on or about the thirteenth day of November, 1913, at my office. There were some people whose names I do not recall who were discussing the purchase of that property, or a property for her work, and it appears that they were going to form an organization to carry on the work. I said I would contribute a lot worth five hundred dollars. It subsequently developed that they could not do anything. They found out that they could buy the lot for four thousand dollars, make a small payment on it, and pay the balance in installments, but Mrs. Smith refused to have anything to do with it. There the matter ended until Mr. Bekins proposed to buy it and asked me if I would contribute if he bought it. Mr. Bekins told me that his purpose was to let her carry on her work there so long as she carried it on along the lines she was then, and if that was for her lifetime, why then she would remain during that time, and if she left a worthy successor, her successor might carry on the same work. Those were the circumstances under which I contributed." It appears, then, that the property in question was purchased expressly for the use of the defendant Ella Smith Trull and that Bekins was not the only person who contributed to make the purchase. Preston's lot, valued at five hundred dollars, was a part of the donation. The defendant last named entered immediately into possession of the premises and continued to occupy the same up to the time of the commencement of the action and the trial. On her behalf an offer was made to show that she had expended considerable money in the making of improvements, such as buildings for use of the religious organization of which she was the head, but the trial court refused to allow the testimony. It has been held in this state that an oral transfer of a life estate in land may be made effectual by the taking

possession of and the performance by the grantee of acts in reliance upon the grant. (*Husheon v. Kelley*, 162 Cal. 656, [124 Pac. 231].) Other cases holding that a life estate may result from an oral agreement are: *Manning v. Franklin*, 81 Cal. 205, [22 Pac. 550]; *Norris v. Lilly*, 147 Cal. 754, [109 Am. St. Rep. 188, 82 Pac. 425]. The same holding also where the estate is conferred as a gift (*Bakersfield Town Hall Assn. v. Chester*, 55 Cal. 98). It is not essential to the creation of a valid life estate that there shall be no condition imposed which may terminate the estate in some contingency prior to the death of the grantee. Referring to estates for uncertain periods, which are not inheritable, or at will, but may last for life, Mr. Reeves in his work on Real Property, volume 1, page 633, says: "It is to be reiterated and emphasized here that such interests as these are life estates. Indefinite duration that may be during a life, incapability of being inherited, and indeterminability merely at will usually place an ownership of realty within the category of life interests. Such are estates to A while he continues to live on the land, to a man and his wife during coverture, to a widow so long as she remains unmarried, to B until he ceases to carry on a specified business, to X while a designated tree stands, and to Y during his residence abroad. Though such an ownership may quickly terminate because of the happening of the specified event, it is a life estate, governed by all the rules and principles of life estates, as long as it continues." Mr. Washburn in his text on Real Property, volume 1, page 102, adds: "This is rather a class of estates, and embraces all freeholds which are not of inheritance, including estates held by the tenant for the term of his own life, or for the life or lives of one or more other persons, or for an indefinite period which may endure for the life or lives of persons in being, and not beyond the period of a life." Section 1161 of the Code of Civil Procedure, in the first paragraph, provides that "A tenant of real property, for a term less than life, is guilty of unlawful detainer, . . . " etc.

From what has been stated in the foregoing, it must appear plain that, conceding that the evidence of Martin Bekins and Preston was sufficient to show an intent that the defendant Ella Smith Trull should have the absolute possession of the real property so long as she should live, or so long as she should continue to conduct the same character of religious ser-

vices as theretofore, then no other circumstances are shown which would render such agreement and transfer invalid. We think that the evidence clearly establishes that the character of interest held by the said defendant was more than that of a mere tenant holding at the will of the landlord Martin Bekins. It will be noted that Bekins in this testimony did not claim that he was to be the sole judge as to whether the services conducted by the said defendant at the new location were of the same character as those which had theretofore been conducted by her. The question as to whether the subsequent services were of the character required depended upon the establishment of the fact itself, and a forfeiture of the interests of the defendant could not be worked at the arbitrary whim of Martin Bekins. In our opinion, the undisputed evidence of Bekins and of Preston, his witness, showed the intent of Bekins and Preston to have vested in the defendant Ella Smith Trull a life estate in the real property described in the complaint, defeasible only upon breach of the condition named. As the transfer rested in parol, we think it was competent for the defendant to show all of the things which she did in compliance with the conditions imposed upon her and by way of acceptance of the donation. The offered testimony to show the expenditure of money in erecting buildings or improvements having to do with affording facilities for the holding of religious services was relevant and proper to be considered. It may be that the condition upon which defendant's right to the possession of the property depends has been broken and that the plaintiff is entitled to have the estate of the defendant declared forfeited. If so, it must be done in some proceeding other than that brought to secure the summary remedy afforded by the code to a landlord whose tenant has breached some condition of his lease.

The judgment appealed from is reversed.

Conrey, P. J., and Works, J., *pro tem.*, concurred.

[Civ. No. 1773. Third Appellate District.—May 13, 1918.]

**WILLIAM B. ROBBEN, Respondent, v. MRS. I. M. BENSON et al., Appellants.**

**VENDOR AND PURCHASER—TITLE FREE FROM DEFECTS—CHANGE OF RECORDS—LIABILITY OF PURCHASER.**—Under the terms of a contract for the sale of real property requiring the vendor to furnish an abstract showing title free from defects, the purchaser is not obliged to accept title, make payments, or forfeit payments made, where the abstract shows that a deed necessary to complete the title which was recorded in the name of one "Robbins," as grantee, was changed by the county recorder by striking out the name "Robbins" and substituting the name "Robben," with a marginal insertion of the date and initials of such official, such change being made thirty-eight years after the recording of the deed and by a different recorder.

**ID.—ACTION FOR FORECLOSURE BY VENDOR AFTER BREACH—RECOVERY ON MONEY PAID AND DAMAGES—RIGHT OF PURCHASER.**—Where a vendor, after breach of contract to furnish an abstract showing title free from defects, commences an action to foreclose the purchaser's rights under the contract of sale, and the purchaser, within the time for answering, surrenders the land, he may file a cross-complaint to recover installments paid and damages for the breach.

**APPEAL** from a judgment of the Superior Court of Solano County. W. T. O'Donnell, Judge.

The facts are stated in the opinion of the court.

Shinn & Hart, for Appellants.

W. U. Goodman, and F. F. Marshall, for Respondent.

**PLUMMER, J., pro tem.**—On a former hearing of this cause this court expressed its views upon some of the issues involved, which, upon review, we are still satisfied correctly express the law upon the questions considered, and, in so far as the opinion then announced relates thereto, the same is hereby adopted, to wit:

"On the 6th day of December, 1911, the plaintiffs and defendants entered into an agreement for the sale and purchase of certain real estate, situate in the county of Solano, for the agreed price of twenty-one thousand six hundred dollars, pay-

able in installments, two hundred dollars in cash, eighteen hundred dollars on the 21st day of the same month, three thousand dollars on the 6th day of December, 1914, and subsequent installments not necessary to mention herein further than that all deferred payments were to bear interest at the rate of six per cent per annum, to be paid on the 6th day of December of each succeeding year, until the full purchase price should have been paid. Under this agreement the defendants went into possession, paid the sum of two thousand dollars on account of the purchase price, and two interest payments in the sum of eleven hundred seventy-six dollars each, as the same became due, together with all installments of taxes on the premises agreed to be purchased. It was also provided in the agreement that the defendants should make improvements on the premises in the way of installing pumping plants and levelling up and planting to alfalfa at least thirty-four acres of said land, all of which covenants appear to have been faithfully kept at a considerable expense on the part of the defendants.

"The contract of purchase further provides as follows: 'The said party of the first part agrees to furnish said second parties with a complete abstract of said premises up to date hereof, within a reasonable time hereafter, and the second parties are to be given fifteen days in which to examine said abstract and report upon the same; in the event that title to said premises shall be found to be defective, said first party is to be given a reasonable time in which to perfect the same. In the event of a failure to comply with the terms hereof by the said parties of the second part, the said party of the first part shall be released from all obligation in law or equity to convey said property, and said second parties shall forfeit all right thereto.' It is also covenanted that in the event of a failure to pay interest on the deferred installments, the vendor might at his election declare the unpaid balance immediately due and payable.

"On the 8th day of December, 1914, the plaintiff, not having furnished the defendants with an abstract of title, demand was made therefor, and the abstract in question was delivered to the defendants for their inspection.

"In order to show a complete title, it became necessary to show a conveyance from one W. D. Vail to B. W. Robben. The abstract disclosed, however, a conveyance made and executed

on the 8th day of November, 1876, and recorded November 10, 1876, from W. D. Vail to B. W. Robbins. Accordingly the abstract was returned to the attorney for the plaintiff, who, it appears, together with an abstractor, went to the office of the recorder of the county of Solano, and on the 14th day of December, 1914, had the recorder draw two or three lines across the word 'Robbins' and write immediately above the word 'Robben,' and then insert on the margin of the record the following: '12/18/14 F. N. D. by J. P. B.' Thereupon the page in the abstract which had theretofore shown a conveyance from Vail to Robbins was removed, and in its place a page inserted showing a conveyance from Vail to Robben, but not disclosing the interlineations and additions and erasures made upon the official records in the recorder's office.

"The defendants, not being satisfied, made a personal inspection of the official records and ascertained the manner in which the changes above noted had been made, and thereupon declined to accept the title altered in such manner, and asked that the defect be properly corrected. The plaintiff refused to have anything more to do with the abstract, but it does appear that on or about the 15th of January, 1915, a conveyance from Vail to Robben was taken to the recorder's office and recorded. However, the existence of this conveyance and of the fact of its being placed of record was not called to the attention of the defendants, nor does it appear that any supplemental abstract was furnished by the plaintiff to the defendants showing the devolution of title from Vail to Robben. The matter appears to have remained *in statu quo* until about April 5, 1915, when the plaintiff began this action to quiet title to the premises involved. The defendants and appellants counterclaimed for the recovery of the purchase money already paid, and for damages. Judgment passed for the plaintiff, and defendants appeal.

"Upon the trial the plaintiff introduced in evidence a patent from the United States to one William T. Smith, and subsequent conveyances, down to and including one to himself, establishing that at the time of the execution of the contract referred to he possessed a merchantable title. Among the deeds introduced was the one hereinbefore referred to, which appears to be a deed from W. D. Vail to B. W. Robben, dated November 8, 1876, recorded November 10, 1876, and re-recorded January 15, 1915. This deed, filed as plaintiff's ex-



hibit 6, is the one which was erroneously recorded in 1876 as being a conveyance from W. D. Vail to B. W. Robbins. There does not appear to be any testimony showing that the existence of this deed was called to the attention of appellants until its introduction in evidence.

"Upon the conclusion of the plaintiff's testimony showing the matters above recited, the defendants moved for a nonsuit, which, not being granted, and which does not appear to have been passed upon by the court at all, the defendants introduced testimony as to their payments, their objection to the title and damages claimed to have been suffered.

"It will be observed that the contract of purchase called for an abstract showing a title free from defects, and not merely for proof on the trial that the plaintiff had a good and sufficient title to the premises agreed to be sold. Was the attempted correction of the title by the erasure on the official records of the name 'Robbins' and the insertion of the name 'Robben' sufficient to render the title clear from doubt, and make it obligatory upon the appellants to accept the same, make payments as provided in the contract, or suffer forfeiture and loss of all former installments?

"In the case of *Benson v. Shotwell*, 87 Cal. 49. [25 Pac. 249, 681], in an action to quiet title brought by the vendor against the vendee for failure to accept title, it appears that a deed which was in fact signed 'Hepburn' was recorded as signed 'Hopkins.' The court said: 'Under the contract, defendant was entitled to a good paper title, sufficient in law, and was not bound to accept a title resting upon the statute of limitations, or take the risk of determining, from facts which he might learn *dehors* the record, whether or not the statute of limitations could be successfully pleaded against an adverse claim. True, plaintiff claimed, and upon the trial proved, that the record was wrong, and that the deed purporting to be from Hopkins was in fact from Hepburn. But at the time when it was his duty to show good title, he allowed the matter to rest upon his naked assertion, and refused to submit his proof for examination, or to permit the deed to be recorded correctly. Defendant had a right, therefore, to stand by the record, and to govern his conduct accordingly.'

"In the case at bar, there does not appear to have been any controversy over the deed from Vail to Robben. Its actual existence does not appear to have been disclosed, nor does the

fact that it was taken to the recorder's office a month later than the furnishing of the corrected abstract, and then re-recorded, appear to have been brought home to the defendants. It thus appears that the plaintiff's right to prevail in this action must stand or fall upon the erasures and interlineations made upon the official record in the recorder's office thirty-eight years after the recording of the written instrument, by a different officer, and for reasons and upon evidence not disclosed to the appellants.

"In the Shotwell case it was held that the vendor had not complied with his contract to show title, and that the production of the deed, the exhibition of it to the vendee, and its introduction upon the trial, did not comply with his contract.

"In *Foster v. Dugan*, 8 Ohio, 87, [31 Am. Dec. 432], the court, having under consideration a correction made by a recorder, and a marginal memorandum, held as follows: 'The marginal note, made by the recorder on the registry, cannot be admitted as evidence to affect the validity of the deed. When it was made does not appear, but it must have been after registration. It is not competent for a public officer to undo what he has once done, and thus correct his errors; when he has executed his duties, he is *functus officio*, and has lost his power over the subject.'

"In *Jennings v. Dockham*, 99 Mich. 253, [58 N. W. 66], it appears that title was vested in one 'Nahum' Chadbourn. By deed recorded October 2, 1848, title was sought to be sustained by offering in evidence a record of a deed purporting to be executed and acknowledged by 'Nathan' Chadbourn to John Chadbourn, recorded October 3, 1853, and a marginal entry on the record as follows: 'The word "Nahum" was recorded "Nathan" by mistake in the annexed record.' Upon these facts the supreme court of Michigan used the following language: 'We think the attempted correction of the record of the deed from Nathan Chadbourn to John Chadbourn by the deputy register was without authority of law.' The case was reversed and remanded for a new trial.

"In *Elliott v. Piersol*, 1 Pet. 328-341, [7 L. Ed. 164], it appears that the record of an acknowledgment to a deed was corrected by interlineations and erasures. There the Supreme Court of the United States disposes of this question in the following decisive form: 'Had the clerk authority to alter the record of his certificate of the acknowledgment of the deed, at

any time after the record was made? We are of opinion, he had not. We are of opinion, he acted ministerially, and not judicially, in the matter. Until his certificate of the acknowledgment of Elliott and wife was recorded, it was, in its nature, but an act *in pais*, and alterable at the pleasure of the officer. But the authority of the clerk to make and record a certificate of the acknowledgment of the deed was *functus officio*, as soon as the record was made. By the exertion of his authority, the authority itself became exhausted. The act had become matter of record, fixed, permanent and unalterable; and the remaining powers and duty of the clerk were only to keep and preserve the record safely.

“ ‘If a clerk may, after a deed, together with the acknowledgment or probate thereof have been committed to record, under color of amendment, add anything to the record of the acknowledgment, we can see no just reason why he may not also subtract from it. The doctrine that a clerk may, at any time, without limitation, alter the record of the acknowledgment of a deed, made in his office, would be, in practice, of very dangerous consequence to the land titles of the county, and cannot receive the sanction of this court.’

“ ‘In *Chamberlain v. Bell*, 7 Cal. 293, [68 Am. Dec. 260], it appears that the description of the premises intended to be conveyed was omitted, and afterwards supplied by interlineation. The court there said: ‘Conceding the propriety of the interlineation, it could only impart notice from the time it was made, and could in no way impair or defeat a title previously acquired.’ It is not decided, nor can it be logically inferred from this language, that the supreme court approved the correction of a deed by the change of the grantee’s name upon the record by a different recorder, thirty-eight years after the original record was made, and that such a procedure established a merchantable title, free from doubt, upon which a purchaser must act at his peril, or be held to have forfeited all purchase money theretofore paid by him, without the existence of the deed in its actual form being brought home to him, or any proof adduced showing that the recorder had acted upon anything other than personal request.

“ ‘In those jurisdictions where it is held that a clerk may amend or correct his records which do not affect titles to real estate, it is the established rule that the correction must be made by the officer who committed the error. The court, in

*Baker v. Webber*, 102 Me. 414, [67 Atl. 144], thus states the rule: 'It is undoubtedly an established rule in New England, respecting the amendment of the records of a city or town, that the clerk who has made an erroneous or incomplete record may, while in office, or after a re-election to the same office, amend or complete such record according to the truth, being liable, like a sheriff who amends his return, for any abuse of the right. (Citing cases.) But without statutory authority one who was formerly a town clerk, but is no longer in office, cannot amend a town record made by him when clerk.'

"That a vendor, who seeks the harsh remedy of forfeiture, must show strict compliance with the terms and conditions of his contract, requires no citation of authorities; and that a clear title, free from doubt, or what has frequently been described as merchantable, must be exhibited by the vendor to the vendee, is also well established."

The third installment on the contract in question became due and payable on December 6, 1914, up to which time it appears that the abstract of title to the premises, though prepared, had not been delivered by the plaintiff to the defendants, and on the eighth day of December demand was made therefor, whereupon the same was delivered by the plaintiff to the defendants.

It appears from the transcript that the defendants waived any rights they might have had by reason of the nondelivery of the abstract, and stipulated that there was no breach in such delivery prior to said eighth day of December. It was further stipulated that the abstract furnished by the plaintiff to the defendants on the eighth day of December showed a conveyance from W. D. Vail to B. W. Robbins, from whom no mesne conveyances were shown vesting title in the plaintiff, and no other action taken than as hereinbefore set forth. Under such circumstances, the defendants were not in default at the time of the institution of plaintiff's suit. It may be stated that it further appears from the transcript that plaintiff, through one of his attorneys, informed the defendants that they would do nothing further in relation to the abstract.

It may be conceded that the plaintiff had, in fact, a good title, but that he failed to make exhibit thereof to the defendants, seems to us beyond question. The re-recording of the deed from Vail to Robben on January 15, 1915, and exhibit thereof to the defendants, would have laid a foundation for

maintaining an action wherein all proper parties defendant having been joined, judgment might have been entered by the trial court, finding plaintiff's title valid, quieting any claims of B. W. Robbins to said premises, establishing of record that the conveyance purporting to be made to Robbins was, in fact, made to Robben, and decreeing performance by the appellants within a reasonable time or suffer the alternative of forfeiture. However, the plaintiff did not elect to pursue this remedy, but chose rather to consider the contract at an end, himself absolved from all its obligations, and instituted this proceeding to quiet title and thus gain the advantage of the installment payments already made under the contract, even though he himself was the party in default. Under these circumstances, what are the rights of the vendees under such contract? In an exceedingly exhaustive opinion, the supreme court of this state, speaking through Justice Henshaw, in *Glock v. Howard etc. Co.*, 123 Cal. 10, [69 Am. St. Rep. 17, 43 L. R. A. 199, 55 Pac. 716], thus lays down the rule: "Now, in such contracts, upon a breach by the vendor of a covenant to convey, what courses are open to the vendee? Obviously these: He may stand upon the contract and sue at law for damages for the breach. Here, his recovery will be governed by section 3306 of the Civil Code; or, still standing upon his contract, he may go into equity, seeking its specific performance; or, he may sue at law to recover the amount that may have been agreed upon as stipulated damages; or, finally, treating the vendor's breach as an abandonment, he may himself abandon it when, the contract having thus come to an end, he may sue at law to recover what he has paid, in an action for money had and received; for, the contract being at an end, the vendor holds money of the vendee to which he has no right, and to repay which, therefore, the law implies his promise."

To a similar effect is the case of *Boas v. Farrington*, 85 Cal. 535, [24 Pac. 787], where it is stated, in substance, that "where a contract for the sale of land provided that the purchase money should be payable in installments, the first installment to be paid on the signing of the agreement, the title to be good or the money to be refunded, the party of the first part to furnish abstract of title to said land, and the vendor furnished an abstract which failed to show good title, the purchaser may rescind the contract and recover the money already paid, although the vendor, as a matter of fact, had a

good title to the property, if the vendor did not offer to remedy the abstract or cause a perfect abstract to be furnished before the time arrived for payment of the second installment."

There, as here, the question was not so much the fact of good title as the failure of the abstract to show a title free from objections.

In *Seals v. Davis*, 25 Cal. App. 68, [142 Pac. 905], the vendee brought an action to recover money paid on account of an agreement to purchase real estate by reason of the vendor's attempted rescission, and the court there held: "When a plaintiff seeks to recover money which he has paid upon a contract which the defendant has attempted to rescind, he may accept such rescission, and bring his action in the form of a common count for money had and received by the defendant to his use and benefit." Citing a number of authorities.

In *McNeil v. Kredon*, 31 Cal. App. 76, [159 Pac. 818], the right of the vendee was before the court upon the sufficiency of the complaint, but the right of the vendee to recover was again affirmed, the court saying: "The complaint states the cause of action. It in effect alleged that the defendants without cause repudiated the contract, declared it canceled, and denied to plaintiff any right or interest therein. This being so, the plaintiffs were relieved from the obligation of further performance on their part, and were privileged to consider and accept the defendant's renunciation of the contract as a rescission of the same." Citing also a number of authorities.

In the case at bar, after the plaintiff had declined to do anything further in relation to the abstract in question or for clearing the title to the premises agreed to be conveyed, and had begun his action to foreclose the rights of the defendants under the contract, the defendants, within the time allowed for answering the plaintiff's complaint, surrendered the lands and premises to the plaintiff and filed a cross-complaint for the recovery of the installments already paid and damages suffered by reason of the plaintiff's breach. Under the authorities above cited it must be held that the defendants had a right to consider the contract as rescinded and prosecute their action for repayment of all installments paid, and also to recover whatever damages they had suffered by reason of the failure of the plaintiff to comply with his covenants therein contained.

The defendants' motion for nonsuit should have been sustained, and the trial court should have proceeded to ascertain and determine the amount of recovery to which the defendants as cross-complainants were entitled.

It follows, therefore, that the judgment of the trial court must be reversed, with directions to proceed with the further hearing of this matter in accordance with this opinion, and it is so ordered.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 11, 1918.

---

[Civ. No. 2369. First Appellate District.—May 14, 1918.]

HENRY HEITMAN, Respondent, v. ALICE M. CUTTING,  
Appellant.

**TRUST—GIFT OF MONEY FOR BENEFIT OF THIRD PARTY.**—Where a person during his last illness, upon discovering that he had unintentionally omitted to remember a servant in his will, directed his son, who had a power of attorney authorizing him to sign checks in the name of his father, to draw one thousand dollars from the bank and give it to his wife for such servant, and the son on the same day drew a check in the name of his father on the bank and mailed it to another bank together with a letter containing instructions to place the same to the account of the wife, and the wife was thereafter informed of what had been done, a transfer of a present, immediate, and indefeasible title to the money in favor of the servant was thereby created.

**ID.—IMPLIED ACCEPTANCE OF TRUST.**—Under such circumstances, a tacit acceptance of the trust by the wife is implied from silence.

**ID.—NECESSITY FOR TRUSTEE—EQUITY.**—Equity will never allow a trust to fail for want of a trustee.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. Bernard J. Flood, Judge.

The facts are stated in the opinion of the court.

**A. J. Treat, for Appellant.****Gerald C. Halsey, and Halsey L. Rixford, for Respondent.**

KERRIGAN, J.—This action was brought to recover one thousand dollars, which sum, it is claimed, was received by defendant in trust for plaintiff. Judgment was for plaintiff, from which defendant appeals.

The facts are as follows: Plaintiff was for many years the gardener and coachman of one Francis Cutting, deceased, and was unintentionally omitted by Cutting from any benefits under his will. On September 27, 1913, Mrs. Francis Cutting telephoned to her stepson, F. P. Cutting, that his father was ill in bed and desired to see him. Francis Cutting at this time was blind, seventy-nine years old, and had been ill for some months. Upon the son's arrival Mrs. Cutting informed him that his father was very much distressed because he had not remembered his coachman, Henry Heitman, in his will. After greeting his sick parent, there was a short conversation between father and son, in which Francis Cutting, the father, ordered his son to draw the sum of one thousand dollars from the bank "and give it to her for him." Appellant was in the room at the time, close to her husband's bedside. The son was instructed to attend to it at once, and promised to do so. For some weeks prior to the death of Francis Cutting, and owing to his blindness, the son had a power of attorney authorizing him to sign checks on the American National Bank of San Francisco in the name of his father. After receiving these instructions, F. P. Cutting went to San Francisco the same morning and drew a check in the name of Francis Cutting on the American National Bank in the sum of one thousand dollars, and mailed the same to the First National Bank of Oakland, together with a letter containing instructions to place the same to the account of Mrs. Cutting. That evening he informed her of what he had done. The check was credited to the account of Mrs. Cutting, and a day or so after, on October 1, 1913, Francis Cutting died.

Upon these and other facts hereinafter stated the trial court found that the defendant, Alice M. Cutting, received to the use of plaintiff the sum of one thousand dollars, to be paid to plaintiff when Francis Cutting should die, and gave judgment accordingly.



It is the claim of appellant that the judgment cannot be sustained upon the theory of a gift either *causa mortis* or *inter vivos*, nor upon a trust imposed upon appellant for the benefit of respondent. In this behalf it is argued that the facts do not show a gift *causa mortis*, for the reason that there is no evidence that decedent was in fear or contemplation of death; and as there was no direction when the gift was to take effect, it could neither constitute a gift *inter vivos* nor a trust imposed upon appellant for the benefit of respondent.

It is true that there is no evidence to support the finding that the money was to be paid "when Francis Cutting should die." This portion of the finding, however, is not material, and cannot be made the basis of a reversal. The facts show that the intention of deceased was to make a transfer of a present, immediate, and indefeasible title to the money for the benefit of Heitman. The transfer was full and complete by the payment of the check, and passed from the donor the legal power, dominion, and title over the money beyond his recall or control, and vested in Heitman an immediate title to the fund, with the right to reduce the same into his possession by enforcing the obligation according to its terms.

Nor does the evidence support the claim that the trust was never accepted by appellant. Aside from the fact that equity will never allow a trust to fail for want of a trustee, appellant by her conduct indicated her willingness to act, and the evidence further shows that the relation she assumed was subsequently acknowledged by her. The absence of positive testimony that the trust was accepted can avail her nothing. Her silence was a tacit agreement to comply with the request. To stand mute under such circumstances is equivalent to consent. (*Becker v. Schwerdtle*, 141 Cal. 386, [74 Pac. 1029].)

From what we have said it follows that the evidence clearly shows the character of obligation imposed upon appellant regarding the money and the purpose for which it was given, and fully supports the conclusion of the trial court that she received the sum for the use and benefit of plaintiff.

Judgment affirmed.

Beasley, J., *pro tem.*, and Zook, J., *pro tem.*, concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on June 13, 1918.

[Civ. No. 1843. Third Appellate District.—May 14, 1918.]

**HOPE MINING COMPANY (a Corporation), Respondent,  
v. N. H. BURGER, Appellant.**

**CONSTRUCTIVE TRUST—PURCHASE OF MINING PROPERTY—TAKING OF DEED IN NAME OF OPTION-HOLDER.**—Where a party has an option to purchase mining property for a certain sum, although it is apparently for a greater sum, and for a valuable consideration such party transfers the option to a third party and the latter pays to the owner the full consideration for the property, but the deed is taken in the name of the original holder of the option, a constructive trust is thereby created in favor of the purchaser.

**APPEAL** from a judgment of the Superior Court of El Dorado County. John Hancock, Judge Presiding.

The facts are stated in the opinion of the court.

Butler & Swisler, for Appellant.

L. J. Maddox, for Respondent.

**BURNETT, J.**—It is difficult to consider seriously the contentions of appellant. The decision of the trial judge is so manifestly just and equitable, and the conduct of appellant in the transaction between the parties so reprehensible, that probably the only question which we ought to notice specifically is whether damages should not be imposed for a frivolous appeal.

However, largely out of respect for the learned counsel for appellant, who has manifested zeal and ability worthy of a better cause, we will devote some attention to the essential features of the case. There was some conflict in the evidence upon material points, but the conflict was created by the testimony of appellant and his brother, whose statements on the witness-stand are apparently characterized by equivocation, evasion, and misrepresentation. It is therefore not surprising that their testimony carried no conviction to the mind of the trial judge. From the opinion filed in deciding the case in the lower court we take the following facts:

The action was brought to compel appellant to convey to plaintiff certain placer mining claims described in the com-

plaint, paid for with the money of plaintiff, and the title to which was taken in the name of N. H. Burger, who is the real defendant in the case, the other names being fictitious.

In December, 1910, the property was owned by one Thomas Clark, who entered into an oral agreement with defendant for its purchase, which was reduced to writing at Placerville on January 3, 1911. The written instrument was somewhat informal, but it recited the receipt of one hundred dollars from N. H. Burger, "being a partial payment on the bond of property known as the Landecker Mine and equipment on same. The price of said mine and equipment to be eleven thousand dollars to be paid as follows." Then followed the recitation of three installments, the first to be paid January 15 and the last April 1, 1911. It was agreed that a more formal contract should be prepared by Clark and delivered to defendant. This was done on January 14, 1911, and at the trial this agreement was introduced in evidence. According to its terms the purchase price was fixed at fifteen thousand dollars, to be paid in four installments, the last one of four thousand dollars to be made on or before the 1st of November, 1911. At the same time it was orally agreed between Clark and Burger that this sum of four thousand dollars was not to be paid to the former but retained by the latter as a commission, it obviously being the intent that Burger should sell the property to another.

B. E. Burger, brother of defendant, undoubtedly knew of the terms of the agreement between Clark and appellant, and on January 3d he went from Placerville to Modesto and informed the principal stockholders of a mining corporation called the Alliance Company that defendant had an option on the Landecker mine, and wanted the stockholders to form a new corporation and take over the mine and option from his brother. He did this under an understanding with appellant. He had with him a copy of the Clark contract, afterward executed on January 14th, which copy he exhibited to the stockholders. At a meeting held the following night it was agreed that Wooten and Benton, two of the stockholders, with B. E. Burger, would examine the mine, and they proceeded to Placerville for that purpose, where they arrived on January 5th. The next day they and the defendant went out to the mine, and on the following night they met at defendant's store and discussed the advisability of forming a new corporation to take over and operate the mine. Defendant informed Wooten

and Benton that he would turn over the contract if the new company was formed and that he would sell the mine "for just what he had paid for it." After this meeting Wooten and Benton returned to Modesto and reported to the other stockholders of the Alliance Company. About a week later B. E. Burger arrived in Modesto and the plaintiff company was organized. Under said contract of January 14th the first installment of the purchase price could be paid by a joint and several note of defendant and such additional makers as was satisfactory to Clark, said note to be payable on or before February 1, 1911. Two days prior to the execution of said contract of January 14th both defendant and B. E. Burger signed such note at Placerville, and it was by the latter immediately taken to Modesto, where on January 14th it was signed by Benton, Williams, and Wooten, and returned to B. E. Burger and afterward delivered to Clark. As a consideration for the execution of this note twenty-five thousand shares of plaintiff company were divided equally among the five makers of said note and defendant thereby became a stockholder of said company. The Hope Mining Company was organized on January 13, 1911, and its articles filed with the county clerk of Stanislaus County. The company immediately took possession of the mine and it made three payments on the purchase price of said property, amounting to eleven thousand dollars, the last payment being made on April 1st. A large sum was also paid by it for work and supplies, and it repaid defendant the one hundred dollars which he paid Clark on January 3d. Neither the plaintiff nor any of its Modesto stockholders knew that the price of the mine as between Clark and defendant was eleven thousand dollars until the trial of the case at Placerville, when for the first time they learned that the last payment of four thousand dollars as set forth in the contract of January 14th was not to be paid Clark, but was to be treated by defendant as a commission for the sale of the property. The plaintiff believed at all times up to the date of the trial that the purchase price to Clark was fifteen thousand dollars and that the only consideration to be received by defendant was a share of the plaintiff's stock. The deed to the property, dated January 12, 1911, from Clark to defendant was deposited in escrow, under the terms of which defendant could obtain it from the bank when the total sum of eleven thousand dollars was paid. He could therefore have obtained

said deed at any time after April 1st, and he did secure it on August 30th, and had it recorded on that date. On that day he also made a deed of the property to plaintiff, but did not deliver it, and the latter had no knowledge of it until after the commencement of this action. Several weeks before the four thousand dollars were due Clark according to the contract of January 14th plaintiff, through its officers, proposed to levy an assessment to make said payment. But defendant and his brother objected, and to avoid the necessity of levying an assessment it was agreed that the time for the last payment would be extended six months.

On October 30th Campbell and Perkins, two of plaintiff's stockholders, went to Placerville and ascertained that defendant had the deed from Clark, and in explanation of this he told them that he had borrowed the four thousand dollars from a friend named Smith living in San Jose. In March, 1912, and before the expiration of the six months' extension granted by defendant to plaintiff in September, 1911, defendant bonded the property to other parties and the sum of six thousand dollars was received as an installment of the purchase price and divided equally between defendant and his brother.

There is abundant evidence to support the foregoing statements, and it is quite apparent therefrom that defendant acted dishonorably with plaintiff, that by his conduct and actions he led plaintiff to believe that Clark was to receive the full fifteen thousand dollars for the property, whereas defendant had a secret agreement to retain the said four thousand dollars which was to be paid by plaintiff. Appellant was guilty of a species of sharp practice which may be recognized as legitimate by some promoters, but it cannot be tolerated in a court of justice. It is plain enough that by agreement between plaintiff and defendant the former was subrogated to all the rights and privileges as well as the obligations of the latter under his agreement with Clark. Of course, this means the actual and not the ostensible obligations. Plaintiff believed that it was to pay the sum of fifteen thousand dollars, but this was by reason of the deception practiced by appellant, and when it had paid the sum of eleven thousand dollars, the actual burden imposed by the original contract, it had discharged its full obligation and was entitled to the deed from Clark. As plaintiff, therefore, paid the full consideration for the property, manifestly, appellant, in receiving the deed, be-

came a trustee for respondent as the court below rightfully held. The case is essentially this: B has an option to purchase the property of C for eleven thousand dollars, although it is apparently for fifteen thousand dollars. For a valuable consideration B transfers the option to H and the latter pays to C the full consideration for the property, but the deed is taken in the name of B. There can be no difference of opinion as to the constructive trust thereby created. It is true that there was no formal written assignment of said option, but the agreement between plaintiff and defendant was such in effect, and as it was fully executed by plaintiff, there could be no question of the statute of frauds.

There is some contention made that the agreement contended for by respondent was made by it and said B. E. Burger and that the evidence is insufficient to show that the latter was authorized to act for the appellant, and, furthermore, that the court improperly admitted as evidence of such agency the declarations of the said B. E. Burger.

There is no merit in the contention. The circumstantial evidence was amply sufficient to show the authority of B. E. Burger to represent his brother in the negotiations and contract with plaintiff. Indeed, the conduct of himself and appellant in the whole transaction is entirely inconsistent with any other theory than that of agency. It is clear that the acts of said B. E. Burger were of such character and so construed as to justify the inference that appellant knew of them and would not have permitted the same if unauthorized. Hence the acts themselves were competent evidence of agency. (2 C. J., p. 958.)

Moreover, appellant testified to facts from which the inference necessarily follows that his brother was authorized to represent him in the sale. He testified that before his brother went down to Modesto the latter said: "I can handle the proposition for you," and appellant gave him a copy of the contract with Clark, and he knew what his brother went down there for and the purpose for which he took the note and the copy of the agreement, and knew what his brother was going to do. Of course, there could be no possible doubt that there was, at least, an ostensible agency within the purview of sections 2300-2317 of the Civil Code. (*Dollar v. International Banking Corp.*, 13 Cal. App. 331, [109 Pac. 499].)

But actual agency was sufficiently established and there was no error in admitting the acts and declarations of B. E. Burger. Where the agency is otherwise *prima facie* proved the declarations of the alleged agent are admissible in corroboration where they constitute a part of the *res gestae* and were made at the time of the transaction in question. They are admissible to show that the agent acted as such and not on his individual account, and also to show the nature and extent of his authority. (*Robinson v. American Fish etc. Co.*, 17 Cal. App. 212, [119 Pac. 388]; 2 C. J., p. 930.)

Moreover, the finding of the court below does not depend upon the agreement made between respondent and B. E. Burger. The evidence is sufficient to show that appellant directly agreed with the representatives of plaintiff that the latter should purchase the property for the price that the former agreed to pay Clark; in other words, that there should be a novation, a substitution of plaintiff for defendant in the contract with Clark. The question of agency may therefore be entirely ignored.

Some question is raised as to the sufficiency of the evidence to support certain specific findings. The material findings are amply supported and the others need not be considered.

The judgment could be supported upon another theory, but we forbear to consider it further. The appellant appears in a very unfavorable light, and it is not surprising that the lower court believed that he was much more anxious to keep the property than to tell the truth or to act justly. We may add that, notwithstanding the judgment against him, he seems to have profited greatly by his cleverness. Without paying out anything, he received several thousand shares of stock of the plaintiff, about one thousand dollars in cash from the latter and six thousand dollars from Everett and Ames, to whom he bonded the mine. In good conscience the cash that defendant received should be paid over to plaintiff, but that consideration is not involved in this proceeding.

The judgment is affirmed.

Chipman, P. J., and Hart, J., concurred.

[Civ. No. 2396. First Appellate District.—May 15, 1918.]

ROBERT HENRY WILSON, as Executor, etc., Appellant,  
v. LONDON GUARANTEE & ACCIDENT COMPANY,  
LIMITED, (a Corporation), Respondent.

**ACCIDENT INSURANCE LAW—INDEMNITY AGAINST LIABILITY FOR BODILY INJURIES—NEGLIGENCE OF EMPLOYEE OF INDEPENDENT CONTRACTOR—ACCIDENT NOT COVERED.**—A policy of insurance against liability imposed by law upon the owner of a building and the party under whose supervision the work was done and who let the contract and did the carpenter and mason work, and resulting from the negligence of any contractor or subcontractor engaged in such work, does not cover an accident to person passing along the street sustained by the negligence of an employee of an independent contractor.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. W. M. Conley, Judge Presiding.

The facts are stated in the opinion of the court.

Hugo D. Newhouse, James Alva Watt, and Watt, Miller, Thornton & Watt, for Appellant.

Walter H. Linforth, for Respondent.

BEASLY, J., *pro tem.*—The essential facts of this case, as they appear to us, are very simple. The defendant, on July 24, 1906, wrote for the plaintiff's testator, James A. Wilson, and for the Pacific States Telephone and Telegraph Company, what is called an "Owner's Contingent Liability" accident insurance policy. It was provided therein that the defendant company "hereby agrees to indemnify Pacific States Telephone & Telegraph Company and James A. Wilson . . . against loss from the liability *imposed by law* upon the assured for damages on account of bodily injuries or death accidentally suffered while this policy is in force by any person or persons during the continuance of the work described in the schedule, *and resulting from the negligence of any contractor or subcontractor engaged in such work.*" The schedule referred to contained the following statement: "All work under



supervision of James A. Wilson who lets contract and does carpenter and mason work himself. This policy covers contracted work only." This provision was inserted for the purpose of bringing Wilson within the terms of this owners' policy. The building involved belonged to the telephone company, not to Wilson. One of the contracts on the building was let to the Roebling Construction Company. On the fifteenth day of November, 1906, and while this latter company was performing work on the building, one of its employees negligently let a heavy plank fall from the window of the building into the street. The plank struck the foot of O. R. Cole, who was passing along the street at the time, and crushed three of his toes. Cole recovered judgment against Wilson. Wilson paid the judgment and sued the defendant on the policy. The trial court decided against him, and he appeals from the judgment.

A great many questions are argued in the briefs of this case and were presented at the oral argument; but it seems to us that the answer to a single question, if in the negative, is decisive of the case, and that question is, whether this accident is covered by the policy.

We think it is not. It will be observed that the policy insured against liability imposed by law upon the assured and resulting from the negligence of a contractor or subcontractor engaged in work on the building. It was stated at the argument that it was difficult to imagine a case which would be covered by this policy. That may be true, but we are not called upon to do more than decide whether the facts of this case bring it within the terms of the policy. The Roebling Construction Company was an independent contractor. There is nothing in the record to show that it occupied any other position than any other independent contractor. This being so, the law imposed no liability upon Wilson for the negligence of the construction company or its employees. There are other provisions in this policy, but none which extend its protection to Wilson beyond that afforded him by the clause thereof quoted.

It is not improper, perhaps, in this connection to state the reasons why Wilson did not defeat the claim of Cole, as upon the record in this case it seems he ought to have been able to do. Cole was injured on the fifteenth day of November, 1906. On or about the 17th of February, 1907, he began his action

against Wilson and the Roebling Construction Company and served Wilson with the summons and complaint. Wilson forwarded these papers to the Insurance Company. On the nineteenth day of February, 1907, the company returned the summons and complaint to Wilson, and notified him in writing that it refused to defend the action, and denied all liability. This accident not being covered by the policy, the Insurance Company was strictly within its rights in refusing to defend it. Wilson did not appear in the action at once, and on the first day of March, 1907, his default was entered, and on the twenty-ninth day of March, 1907, judgment was taken against him in the sum of six thousand three hundred dollars. From then until the fifteenth day of June, 1907, nearly three months later, he took no steps whatever in the action, but on the last-mentioned date served upon Cole's attorneys a notice of motion to set aside the default and the judgment based thereon upon the grounds, among others, that the default was entered on account of his excusable neglect. Voluminous papers were filed upon this motion, and it was finally denied. Wilson appealed to the supreme court, and that court sustained the trial court. Thereupon he paid the judgment, as has been said, and began this action against the defendant.

No good reason appears in the record why he should not have defended the case. His contention that he could not do so because of a provision in the policy to the effect that he would not interfere with litigation but would leave the conduct of the same to the Insurance Company does not excuse him, because the Insurance Company promptly notified him that it would not defend the action, and it was his duty to himself, and he had the legal right of course, to make the legal defense which, according to his affidavit of merits filed upon the motion to set aside his default, he was advised and believed he had. This court cannot make a contract of insurance for him at this late day covering this liability, nor can it assist him to avoid the effects of his own remissness in not defending the action begun against him, by giving him a judgment against the Insurance Company to which his policy does not entitle him.

The judgment is affirmed.

Kerrigan, J., and Zook, J., *pro tem.*, concurred.

[Civ. No. 2157. Second Appellate District.—May 15, 1918.]

T. C. WHITCOMB, Respondent, v. W. O. HUSE, Defendant;  
GEORGE H. WOODRUFF, Appellant.

[Civ. No. 2158. Second Appellate District.—May 15, 1918.]

T. C. WHITCOMB, Respondent, v. C. O. MIDDLETON,  
Defendant; GEORGE H. WOODRUFF, Appellant.

**NEGOTIABLE INSTRUMENTS—NOTICE OF PROTEST BY MAILING—STATEMENT IN CERTIFICATE OF PROTEST.**—Where a notice of protest of a promissory note is given by mail, the provisions of subdivision 3 of section 3144 of the Civil Code must be followed, which permits the mailing to residence alone, and a protest which recites that notice was mailed to the office of the indorser is not *prima facie* evidence of the matters stated therein as declared by section 795 of the Political Code.

**APPEALS** from judgments of the Superior Court of Los Angeles County. G. W. Nicol, Judge Presiding.

The facts are stated in the opinion of the court.

Clyde C. Shocmaker, and George H. Woodruff, *in pro. per.*,  
for Appellant.

Valentine & Newby, Nathan Newby, and Hugh A. McNary,  
for Respondent.

**WORKS, J., pro tem.**—The questions arising on these two appeals are identical. References to the facts and to the parties will be according to the record in *Whitcomb v. Huse*. The action was brought to recover on two promissory notes, Huse being sued as a maker and Woodruff as an indorser. Judgment went for the plaintiff and Woodruff appeals.

It is contended by the appellant, among other things, that the trial court erred in admitting in evidence the notary's certificates of protest of the notes sued upon and also his certificates of notice of protest. The ground of the contention is that the documents failed to comply with the terms of section 795 of the Political Code, which provides that protests, stating certain facts, including "the reputed place of residence" of the party to a bill or note and of the party to whom it was

given, "and the postoffice nearest thereto," are *prima facie* evidence of the matters stated in them. Both of the instruments which were received in evidence are to be considered together in determining whether the "protest" is so complete in its subject matter, under section 795, as to make it *prima facie* evidence of the matters stated in it (*Kellogg v. Pacific Box Factory*, 57 Cal. 327, 329); although, strictly speaking, but one of those instruments was the protest. Taking them both together, however, they make no showing as to the reputed place of residence of either Huse, the maker of the paper, or of the appellant, the payee. They show, only, as far as address is concerned, the location of the "office" of Huse, except that they show that the notice of protest was mailed to Huse at that address and to the appellant at a certain designated room in the "Merchants National Bank Bldg., Los Angeles, Cal." Notwithstanding this state of the "protest," the respondent insists that the documents were admissible in evidence upon the authority of *Kellogg v. Pacific Box Factory*, *supra*. In the opinion in that case it was said, at page 330: "It [the protest] does not state the place of residence of the party to the note, nor the postoffice nearest thereto; and because it does not, the respondents contend that it was inadmissible as evidence. It does, however, state that everything which is certified to have been done and served was done and served at San Francisco. The letters containing notice of the protest of the note were delivered at the respective places of business of the respondents, and in each instance to a person of discretion having charge thereof. As that was done at San Francisco, the respondents' place of business must have been there, and it was not necessary to state that the San Francisco postoffice was nearer than any other postoffice to San Francisco. A delivery of the notice at each of respondents' places of business to some person of discretion in charge thereof obviated the necessity of delivering it at or sending it by mail to the respective residences of the respondents; and therefore it was unnecessary to state where said residences were, or the postoffice nearest thereto."

In order properly to determine the applicability of the *Kellogg* case to the present question, it is necessary to refer to section 3144 of the Civil Code, which was, at the time that case was decided, and now is, in the following language:

"A notice of dishonor may be given:

"1. By delivering it to the party to be charged, personally, at any place; or,

"2. By delivering it to some person of discretion at the place of residence or business of such party, apparently acting for him; or,

"3. By properly folding the notice, directing it to the party to be charged, at his place of residence, according to the best information that the person giving the notice can obtain, depositing it in the postoffice most conveniently accessible from the place where the presentment was made, and paying the postage thereon."

It will be noted from the text of the Kellogg case that notice of dishonor was there given, under the alternative allowed by the second subdivision of section 3144, by a delivery at the places of business of the indorsers, and that the doctrine of the case is really based upon that fact. The ruling amounts to nothing more than a statement that the language of section 795 of the Political Code requiring a statement of the reputed place of residence and of the postoffice nearest thereto need not be followed where notice of dishonor is given by delivery of the notice at the place of business. Here, however, the situation is quite different. Notice of protest was given by mail and notice may be given in that manner only pursuant to the provisions of the third subdivision of section 3144, which permits a mailing to residence alone. In such a case the statement of reputed residence and of the nearest postoffice is most material, and such a statement is of the very essence of the "protest." It is our opinion that a "protest" is *prima facie* evidence of the matters stated in it only when it contains a recital of all the facts material to the case in which it is offered in evidence and which are mentioned in section 795. The section makes the "protest" *prima facie* evidence of things of which it ordinarily would be no evidence at all. It allows a departure from the usual rules of evidence, and those who would avail themselves of its provisions must, therefore, bring themselves clearly within its terms.

The judgments are reversed.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 11, 1918.

[Civ. No. 1769. Third Appellate District.—May 15, 1918.]

**MARK L. BURNS, Appellant, v. G. F. BAUER, Respondent.**

**ACTION ON PROMISSORY NOTE—LACK OF CONSIDERATION—FRAUD—SUFFICIENCY OF EVIDENCE.**—In this action by the assignee of a promissory note executed to a corporation in payment for stock, it is held the evidence supports the finding that there was no consideration for the note, and that it was obtained by the corporation through fraudulent representations.

**ID.—NOTE PROCURED BY FRAUD—ACTION BY ASSIGNEE—INNOCENT HOLDER—BURDEN OF PROOF.**—In an action by the assignee of a corporation on a note given in payment for its stock, and procured from the maker by fraud and misrepresentations, the burden is upon the assignee to prove he is an innocent holder.

**APPEAL** from a judgment of the Superior Court of El Dorado County. N. D. Arnot, Judge.

The facts are stated in the opinion of the court.

F. G. Eby, for Appellant.

Abe Darlington, and Wm. F. Bray, for Respondent.

**CHIPMAN, P. J.**—Plaintiff brought the action to recover on a promissory note executed and delivered by defendant at Diamond Springs, California, September 7, 1915, to Great Western Securities Corporation, due one year after date at seven per cent interest, assigned to plaintiff by the following indorsement: "Pay to the order of Mark L. Burns, Great Western Securities Corporation, by S. H. Whisner, Pres. Payment Guaranteed. Signed: S. H. Whisner."

In his amended answer, defendant admits the execution of the note but denies that it was executed or given for a valuable or any consideration, and alleges that it is without consideration and void. Denies that plaintiff became the owner or holder of said note before maturity or that he is the owner or holder thereof for value or otherwise. Alleges that said note was given in payment of certain stock of said Great Western Securities Corporation, which said stock was represented to defendant by said corporation "to be valuable and to be reasonably worth the price at which it was sold to defendant, but

said stock was then, and ever since has been, entirely worthless and was known at the time of said agreement to sell the same to defendant by said Great Western Securities Corporation, a corporation, to be worthless and of no value whatever; and there was no other consideration for said promissory note"; that at the time said note was assigned to him, plaintiff knew that it was without consideration and knew that it was void and that the stock of said corporation was worthless, and that he did then and there conspire with said corporation to defraud defendant by having said note indorsed by said Whisner to plaintiff "for the purpose of preventing defendant from making his defense of want of consideration when suit should be brought upon said note"; that "no stock was ever issued to defendant by said Great Western Securities Corporation, a corporation, until the time of the pretended assignment of said note to plaintiff."

As a further and separate answer and by way of affirmative defense, defendant alleges certain facts, most of which were by the court found substantially as alleged, and may be stated as given in the findings, as it will shorten somewhat this opinion. The cause was tried by the court without a jury. At the close of the trial and the coming in of the closing brief, the court made the following minute order:

"In our opinion the plaintiff was not an innocent purchaser for value of the note sued on. The inadequacy of the consideration he paid for the note put him upon inquiry as to the circumstances under which the note was given and the consideration the payee had given Bauer. This was easy for him to have done. He could and ought to have communicated with Bauer. He did not even make inquiry of Whisner. His friend Eby was the secretary of the payee. He made no inquiry of him. His only concern was to ascertain if Bauer was good. There was no need of rescission because the stock was valueless. The motion to strike out is denied. Counsel for defendant may take ten days to prepare and serve findings herein.

"N. D. ARNOT,  
"Judge."

In due course the court made the following findings of fact: That said promissory note was given in part payment for 750 shares of the capital stock of said Great Western Securities Corporation (hereinafter referred to as the Securities Corpo-

ration), which said stock was and is of no value whatever; that on July 8, 1916, said Securities Corporation, by its president, S. H. Whisner, assigned said note to plaintiff for the consideration paid of \$350, and at the making of said assignment the said Whisner personally guaranteed payment thereof, no part of which or interest thereon has been paid; that the stock of said corporation, in part payment for which said note was given, was represented to defendant, at the time he contracted to purchase the same, to be valuable and reasonably worth the price at which it was sold to defendant, to wit, the sum of one dollar per share, but in fact said stock was then worthless and of no value, which was well known to said corporation; "and plaintiff, at the time said note was assigned to him, knew that the Great Western Securities Corporation was involved in litigation, but made no effort to ascertain whether or not said note was given for a valuable consideration." The transaction, as found by the court, is set forth as follows in its findings: "That on the seventeenth day of February, 1914, one J. S. Danner, the agent of said Great Western Securities Corporation, called upon defendant at his home in the County of El Dorado, state of California, and asked him to become a subscriber for shares of stock in Great Western Securities Corporation, a corporation. Said J. S. Danner represented to defendant that said corporation had been organized for the purpose of erecting a twenty-story building in the city of Sacramento, state of California, and he further stated to defendant that said corporation had obtained an option on a lot on J Street between Fifth Street and Sixth Street in said city, and stated that work on said building would commence not later than October 31, 1914; that said corporation already had a building permit for said building and had a large portion thereof leased to prospective tenants, and further stated to the defendant that even if thirty per cent of said building were idle and untenanted, the net income therefrom would be fifteen per cent. . . . That the representations of said J. S. Danner, as agent of said corporation, as aforesaid, were false at the time said representations were made by said J. S. Danner, and said corporation knew that said representations were false at the time said Danner made the same. That it was reliance upon the representations of said J. S. Danner, made as aforesaid, that caused defendant to enter into the agreement to purchase 750 shares of the capital stock of said



plaintiff corporation, and if it had not been for said representations aforesaid defendant would not have entered into said agreement to purchase said stock. . . . That by reason of the representations of said corporation as above set forth defendant entered into a contract with it for the purchase of 750 shares of its capital stock and paid on account thereof a total of more than \$622, and gave the promissory note mentioned in plaintiff's complaint for the balance of the agreed purchase price and interest remaining due at the date of said note. That if it had not been for the false and fraudulent representations of said corporation, as herein set forth, defendant would not have contracted for any of said stock. That the promissory note sued upon herein was assigned to the plaintiff by said Great Western Securities Corporation, by S. H. Whisner, its president, on the eighth day of July, 1916; that the consideration paid therefor was the sum of \$350; that the plaintiff is and was on said eighth day of July, 1916, a lawyer engaged in a general law practice; that the stock for which said note was given in part payment was not issued until said eighth day of July, 1916, but was issued on said day; that Mr. F. G. Eby, who is the plaintiff's attorney in this action, was the secretary of said Great Western Securities Corporation at the time said stock was issued and at the time this action was commenced; that plaintiff, at the time he purchased said note, knew that said Great Western Securities Corporation and other corporations organized and controlled by said S. H. Whisner were involved in much litigation; that plaintiff made no inquiry or effort to learn whether or not said note was valid and given for a valuable consideration, but did inquire into the financial condition of the defendant and learned that he was able to pay the note and then purchased the same, intending to bring suit upon it if it should not be promptly paid."

As conclusions of law the court found that said promissory note was procured by fraud and is void for want of consideration; that plaintiff is not an innocent purchaser nor a *bona fide* holder of said note; that plaintiff is entitled to take nothing by this action; that said note be canceled by the clerk of this court, and that defendant recover his costs of suit herein.

Judgment was accordingly entered, from which plaintiff appeals.

The evidence abundantly supports the findings that there was no consideration for the note sued upon, and that it was obtained by the Securities Corporation through false and fraudulent representations. Not only is defendant's narrative of the false statements made to him by the Securities Corporation's agents uncontradicted, but the record contains specimens of the literature, highly misleading, gotten out by the Securities Corporation and exhibited to its victims, including defendant, as inducement to purchase its shares. As part of this promotion propaganda is found in the record the photograph of an imposing structure of architectural beauty looming skyward to the ambitious height of twenty stories, twice the height of any of the finer business buildings in the city of Sacramento. These flaming photographs were accompanied by commendatory letters written by officials of prominent banks in said city which, while not indorsing the corporation, or its financial standing, spoke in encouraging terms of the project to erect such a building. In short, the evidence shows that a gross fraud was perpetrated by that corporation on defendant in inducing him to purchase its stock. It was to throttle in their infancy just such schemes as this that our "Blue Sky Law" (Investment Companies Act, Stats. 1913, p. 715) was enacted, and it was the imposition being practiced on a confiding public by promoters of such schemes which gave birth to the law.

The only question in the case worthy of further consideration is connected with the findings in respect of plaintiff's relation to the promissory note, the subject of the action.

The court found that the note sued on was assigned to plaintiff by the Securities Corporation on July 8, 1916, by S. H. Whisner, its president, and plaintiff paid therefor \$350; that plaintiff at that time was a lawyer engaged in a general law practice; that the stock for which said note was given in part payment was issued on the same day; that plaintiff's attorney in this action was the secretary of said Securities Corporation at the time said stock was issued and at the time this action was commenced; that at the time he purchased said note, plaintiff knew the said Securities Corporation or other corporations organized and controlled by said Whisner were involved in litigation; "that plaintiff made no inquiry or effort to learn whether or not said note was valid and given for a valuable consideration but did inquire into the financial

condition of the defendant and learned that he was able to pay the note and then purchased the same intending to bring suit upon it if it should not be promptly paid." The face value of the note when transferred was \$423.33. It was, therefore, discounted to the extent of \$73, and no explanation is given why the Securities Company was willing to sell the note, falling due in so short a time, for so great a discount, the maker of which concededly was able to pay it; nor is there any explanation of the fact that the president of the payee corporation was required by the plaintiff to personally guarantee the payment; nor why plaintiff did not, after the defendant had refused to pay the note, call upon the guarantor for payment before bringing suit against the maker, which, under the circumstances shown, would have been a natural thing to do and upon whom he had the right to call immediately without demand or notice. (Civ. Code, sec. 2807.) Plaintiff testified that he made no inquiry from the president of the company as to his authority to assign the note, nor from the secretary of the corporation, his attorney herein, as to the consideration given for the note nor as to any of the circumstances under which it was given, nor as to any fact from any person except to ascertain that defendant was able to pay it. Plaintiff was an attorney at law engaged in the practice of his profession and did not claim to be a purchaser of commercial paper in the regular course of his business. Plaintiff testified that he did not purchase the note with the intention of bringing suit should defendant fail to pay, and that if he had supposed it would have been necessary for him to do so, he would have had nothing to do with it. The finding of the court is to the contrary, and if it was not justified in doing so, there remain findings sufficiently supported by the evidence to justify the judgment.

The rule in this class of cases is stated in *Jordan v. Grover*, 99 Cal. 194, [33 Pac. 908]. In that case plaintiffs purchased the promissory note in question "before maturity and for one-half of its face value, with knowledge upon inquiry previously made of the maker's solvency, but without inquiry as to the consideration thereof; nor was there any reason or explanation given for the purchase of the note at a price so grossly inadequate to its actual value. These circumstances," said the court, "were of themselves sufficient to arouse the suspicions of an ordinarily prudent man and put him on inquiry as to

the consideration, therefore material for the consideration of the jury in determining whether the purchase was made by plaintiffs in good faith." The rule there stated "as well settled" was: "Where fraud or illegality in the inception of the note is shown by the maker, the burden of proof is then cast upon the indorsee to show that he is an innocent holder" (citing cases), and the court said: "The plaintiffs must, therefore, in order to sustain the burden thus cast upon them, show that they purchased the note before maturity in good faith, for value in the usual course of business, and 'under circumstances which create no presumptions that they knew the facts which impeach its validity. (1 Daniel on Negotiable Instruments, 4th ed., sec. 815.)' "

It is a fair inference from the evidence that the president and secretary of the corporation knew that its stock, which was the consideration given for the note sued upon, was sold under false representations and that there was in fact nothing of value given as a consideration for the note. We think, too, that the facts and circumstances elicited at the trial were such as justified the court in its conclusion "that plaintiff is not an innocent purchaser nor a *bona fide* holder of said note." The circumstances under which the note was sold to plaintiff; the heavy discount offered so near to the due date of the note, the maker of which was known by both the corporation and plaintiff to be able to pay, would have suggested to an ordinarily prudent man that there might be some infirmity in the paper and that it might not be safe to rest wholly on an inquiry as to the ability of the maker of the note to pay it when due. We do not think that plaintiff sustained the burden which was cast upon him by proof that the note was tainted with fraud and was without consideration. Plaintiff was put upon inquiry which, had it been reasonably pursued, would have placed him in possession of the facts. He testified: "I think Mr. Whisner [his guarantor] is able to reimburse me and will do so, I think, if I am unsuccessful in this case." It is not improbable that his reliance upon Mr. Whisner's ability to respond to his guaranty led plaintiff to be indifferent as to the circumstances surrounding the execution of the note. His investment was safe in any event.

We think the judgment should be affirmed, and it is so ordered.

Hart, J., and Burnett, J., concurred.

87 Cal. App.—17

[Civ. No. 2410. First Appellate District.—May 16, 1918.]

**M. DAVIDSON**, Appellant, v. **M. RAFAEL et al.**, Defendants; **C. RAFAEL**, Respondent.

**ACTION ON PROMISSORY NOTE—INTEREST—RATE IN EXCESS OF LIMITATION OF PERSONAL PROPERTY BROKER'S ACT—WHEN ALLOWABLE.—**  
In an action on a promissory note bearing interest at the rate of five per cent per month, interest is to be calculated at such rate in the judgment, where the note is unsecured and no showing made that the plaintiff was a personal property broker.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. **Jas. M. Troutt**, Judge.

The facts are stated in the opinion of the court.

**William G. Weiss**, for Appellant.

**M. H. Wascerwitz**, for Respondent.

**THE COURT.**—The plaintiff brought suit upon a promissory note executed by the defendants, husband and wife, bearing interest at the rate of five per cent per month. Defendant **C. Rafael** filed her answer, in which she set up the defenses of payment, want of consideration, and false pretenses used in obtaining her signature to the obligation. The court found all these issues in favor of the plaintiff, but also found that the contract to pay interest at the rate of five per cent per month was unreasonable, unconscionable, and usurious. Accordingly, in arriving at the amount due to the plaintiff the court allowed interest on the principal of the note at the rate of two per cent per month from the time interest was payable; and it appearing that the defendant had paid, during a period of about two years, interest at the higher rate, the court credited three-fifths of the sum thus paid as interest, namely, three per cent per month, on the principal of the note, and entered judgment for the plaintiff for the balance.

The note in suit being unsecured, and there having been no showing in the court below that the plaintiff was a personal property broker, and therefore subject to the provisions of the act limiting the interest allowed to be charged by such brokers to two per cent per month, it is urged by the appellant that the

method of calculation adopted by the trial court was incorrect; that the parties having agreed upon the rate of interest, it should have been allowed in accordance with the terms of the agreement until the entry of judgment. (Civ. Code, sec. 1918.) Counsel for the respondent, while pointing out that the interest already paid by his client amounts to a sum greater than the principal of the note plus seven per cent interest per annum, concedes that legally the plaintiff was entitled to his pound of flesh and confesses error. Accordingly, it is ordered that the judgment be reversed and the cause remanded for a new trial.

---

[Civ. No. 2424. First Appellate District.—May 16, 1918.]

**ELEANOR MATTHEWS, Appellant, v. HUGH  
MATTHEWS, Respondent.**

**DIVORCE — ALIMONY — MODIFICATION OF DECREE — CHANGED CIRCUMSTANCES.**—An order modifying an interlocutory decree of divorce in respect to allowance of alimony will not be disturbed on appeal where it was shown that the wife had acquired an interest in improved real property from which she derived an income.

**ID.—AGREEMENT AS TO AMOUNT—CONFLICT OF EVIDENCE—APPEAL.**—An order modifying an interlocutory decree of divorce in respect to allowance of alimony will not be disturbed on appeal where the evidence as to the existence of an alleged agreement relating to the amount was conflicting.

**APPEAL** from an order of the Superior Court of the City and County of San Francisco modifying an interlocutory decree of divorce. Jas. M. Troutt, Judge.

The facts are stated in the opinion of the court.

Algernon Crofton, and Gillogley, Crofton & Payne, for Appellant.

I. I. Brown, and A. P. Crist, for Respondent.

**THE COURT.**—Appeal from an order modifying an interlocutory decree of divorce in respect to allowance of alimony.

It appears from the record that on November 3, 1915, Eleanor Matthews, the plaintiff, obtained an interlocutory decree of divorce from her husband, Hugh Matthews, upon the ground of extreme cruelty. Summons was served personally upon defendant, who made no appearance. By the decree the defendant was ordered to pay to the plaintiff \$125 monthly as a permanent allowance, beginning November 8, 1915. On April 22, 1916, the defendant moved to modify the decree in this respect. On June 27, 1916, the court made an order reducing the allowance to one hundred dollars, and from this order the plaintiff appeals.

Three points are urged for reversal: (1) That the court had no power to modify the decree unless it appeared on the hearing of the motion that the circumstances of the parties had changed since the original decree was made. (2) That the parties had entered into an agreement with reference to alimony, which the court had no authority to modify. (3) That the decree should not have been modified for the reason that the amount allowed therein was and is proper.

In support of his position the attorney for appellant has furnished us with an instructive and carefully prepared brief upon the legal questions involved and upon which he relies for reversal; but we are of the opinion that all of these points resolved themselves into questions of fact, which, under conflicting evidence having been determined adversely to appellant, such determination is conclusive here.

The question whether there was a sufficient change in the circumstances of the parties accruing since the decree was amply shown by the evidence. It affirmatively appears that plaintiff had acquired an interest in improved real property from which she derived an income.

With reference to the existence of the agreement relating to the amount of alimony to be allowed, no evidence was presented aside from the affidavits of plaintiff and defendant. These were conflicting on the subject. The existence of the agreement, therefore, merely presented another question of fact. True, there is no express finding on the subject, but this must be presumed in the absence thereof in support of the judgment.

What we have said with reference to the foregoing questions applies with equal force to the third point relating to the question of proper allowance.

As above shown, a different and changed condition in the circumstances of the parties had occurred since the rendition of the decree. All of these questions were, under conflicting evidence, addressed to the sound discretion of the court. There is no claim or showing that this discretion was arbitrarily exercised or abused.

For the reasons given the order appealed from is affirmed.

---

[Civ. No. 2288. First Appellate District.—May 16, 1918.]

**GUSTIN WHITE et al., Copartners, etc., Respondents, v.  
WESTERN FISH COMPANY et al., Defendants; AN-  
TONIO TRAPANI, Appellant.**

**NEGLIGENCE—COLLISION BETWEEN AUTOMOBILE AND TAXICAB—CONFLICT OF EVIDENCE—FINDINGS CONCLUSIVE ON APPEAL.**—In an action for damages resulting from a collision between an automobile and taxicab, where the evidence is conflicting and contradictory as to whether the collision was due to the negligence of the driver of the taxicab or to the defendant, the findings of the trial court will not be disturbed on appeal.

**ID.—DAMAGES—CONFLICT OF EVIDENCE—QUESTION FOR TRIAL COURT.**—Where the testimony as to damages is conflicting, the amount to be awarded is a question for the determination of the trial court.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. Daniel C. Deasy, Judge.

The facts are stated in the opinion of the court.

Wm. M. Madden, for Appellant.

Harry I. Stafford, for Respondents.

**THE COURT.**—The appellant, Antonio Trapani, while driving his automobile at the intersection of Webster and Geary Streets in the city of San Francisco one stormy night, collided with a taxicab owned by the plaintiffs. The trial court gave judgment against Trapani for \$520.05, and from this judgment he appeals.

The appeal presents nothing but the disputed question of fact whether the collision was due to the negligence of the



plaintiff's driver or the defendant Trapani. The evidence, as is usual in such cases, is conflicting and contradictory. The trial court accepted the statements of plaintiff's witnesses. We have examined the record with care and find no reason to disturb the findings of the trial court.

Complaint is made that the damages awarded were too large, but on this subject also the testimony was conflicting, and it was a question for the trial court to determine.

The judgment is affirmed.

A petition for a rehearing of this cause was denied by the district court of appeal on June 15, 1918.

---

[Crim. No. 741. First Appellate District.—May 16, 1918.]

THE PEOPLE, Respondent, v. ANDREW SWENSEN,  
Appellant.

CRIMINAL LAW—COMMISSION OF LEWD ACT—EVIDENCE—EXPLANATIONS OF DEFENDANT—QUESTION FOR JURY—APPEAL.—In a prosecution for the commission of a lewd act upon the person of a child, the truth or falsity of explanations made by defendant as to his situation and conduct is for the determination of the jury, and its functions cannot be usurped on appeal.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. George H. Cabaniss, Judge.

The facts are stated in the opinion of the court.

Thomas P. Wickes, and Karl F. Kennedy, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, for Respondent.

THE COURT.—The defendant was accused of committing a lewd act, as denounced in section 288 of the Penal Code, upon the person of a child three and a half years of age. He was convicted of an attempt to commit this crime. He was found in a basement with the child. Her clothes were down.

She had a nickel, which she said he gave her. He contradicted this statement. He ran when discovered emerging from the basement, but was pursued and arrested. Various plausible explanations of his situation and conduct are offered by his counsel, upon which we are asked to say that the verdict is not sustained by the evidence. All these explanations were by the record presented to the jury. We cannot nor have we any disposition to usurp their functions in determining the truth or falsity of these explanations.

It is also contended that the evidence failed to show an attempt to commit the crime. We think, however, that it is sufficient for this purpose.

Some complaint is made of the refusal of the court to give certain stock instructions requested by the defendant; but these instructions were all given—in different language, it is true—but in effect by the court in its charge to the jury.

The judgment is affirmed.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 15, 1918.

---

[Civ. No. 2374. First Appellate District.—May 16, 1918.]

**BRADLEY COMPANY (a Corporation), Respondent, v.  
EMMA R. BRADLEY, Appellant.**

**TRUST—DEED ABSOLUTE ON FACE—PAROL EVIDENCE—STATUTE OF FRAUDS.**—Under the statute of frauds it is the general rule that parol evidence cannot be received to prove that a deed absolute on its face was given in trust for the benefit of the grantor.

**ID.—FRAUD—EXCEPTION TO RULE.**—Where, however, by means of an oral promise made without any intention of performing it, one obtains an absolute deed without giving any consideration therefor, it is a case of actual fraud, and the statute of frauds is not a bar to relief.

**ID.—CONSTRUCTIVE FRAUD—VIOLATION OF PROMISE TO RECONVEY.**—If a grantee by means of a parol promise to reconvey obtains an absolute deed without consideration from one to whom he stands in a confidential relation, the breach of the promise is constructive fraud,

although at the time it was made there was no intention not to perform.

**ID.—ACTION TO DECLARE TRUST—SUFFICIENCY OF EVIDENCE.**—In this action to declare defendant an involuntary trustee of certain real property, it is held that the evidence sustains the finding that the conveyance was made upon the understanding that the property was to be held in trust and to be reconveyed upon demand.

**ID.—EXISTENCE OF CONFIDENTIAL RELATIONSHIP—SUFFICIENCY OF EVIDENCE.**—In this action, it is also held that the evidence supports the finding that a confidential relationship existed between the parties at the time of the delivery of the deed.

**ID.—CONFIDENTIAL RELATIONSHIPS—INFERENCE FROM PROVEN FACTS.**—There are certain relationships from the existence of which the law infers special confidence, such as those of husband and wife, parent and child, guardian and ward, counsel and client, etc., but it also exists in numerous cases where the facts proven will warrant the inference.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. James M. Troutt, Judge.

The facts are stated in the opinion of the court.

Charles Baer, for Appellant.

Stoney, Rouleau & Stoney, and Orville C. Pratt, Jr., for Respondent.

**KERRIGAN, J.**—This is an appeal by the defendant from a judgment in favor of plaintiff declaring defendant an involuntary trustee of certain real property and ordering an accounting.

The facts pertinent to this appeal, outside of those stated in the course of this opinion, are fully set out in *Bradley Company v. Bradley*, *post*, p. 270, [173 Pac. 1009].

The complaint alleges and the court found that one Richard Bradley, respondent's predecessor in interest, owned a lot on Gough Street, in San Francisco, on November 10, 1906; that he desired to borrow money on said property, and, in order to do so without appearing himself as the borrower, he made a conveyance thereof to the defendant in order that she might borrow money upon it for him; that on said date, without receiving any consideration therefor, he conveyed the same to her by a grant, bargain, and sale deed, and that she orally

promised and agreed to take and hold said property in trust for him, and to borrow money by mortgage upon it, and on demand to reconvey it to him; that at said time and for a period prior thereto defendant was and had been the confidential agent of Bradley, and that said conveyance was made in implicit reliance upon the confidential relations existing between Bradley and the defendant. The complaint also averred that defendant refused to reconvey, and had repudiated said trust, and prayed that defendant be declared an involuntary trustee, and that she be compelled to account for the rents and profits of said real property. Other details are set forth in the complaint, but the foregoing is sufficient for a consideration of the case.

The facts alleged are specifically denied by the answer, which avers that the conveyance was made for the purpose of transferring to the defendant the title to said property in fee simple absolute without any conditions, qualifications, or limitations, and not for the purposes alleged in plaintiff's amended complaint.

As just shown, the theory of plaintiff's case was based upon the existence of a confidential relationship between Bradley and the defendant. As to this it is to be noted that at the time of the conveyance they were not husband and wife, but were married about three years later.

Under the statute of frauds it is the general rule that parol evidence cannot be received to prove that a deed absolute on its face was given in trust for the benefit of the grantor. Where, however, by means of an oral promise made without any intention of performing it, one obtains an absolute deed without giving any consideration therefor, it is a case of actual fraud, and the statute of frauds is not a bar to relief. (*Feeney v. Howard*, 79 Cal. 525-527, [12 Am. St. Rep. 162, 4 L. R. A. 826, 21 Pac. 984].) But this case does not fall within that exception to the general rule. It is claimed, however, that it falls within the exception to the rule declared in *Brisson v. Brisson*, 75 Cal. 525, [7 Am. St. Rep. 189, 17 Pac. 689], to the effect that if a grantee by means of a parol promise to reconvey obtains an absolute deed without consideration from one to whom he stands in a confidential relation, the breach of the promise is constructive fraud, although at the time it was made there was no intention not to perform. (*Dimond v. Sanderson*, 103 Cal. 97-102, [37 Pac. 189]. See,

also, *Feeney v. Howard*, *supra*; *Adams v. Lambard*, 80 Cal. 426, [22 Pac. 180].) The law, from considerations of public policy, presumes such transactions to have been induced by undue influence.

With the law as thus stated, the parties to this appeal are in accord, the only serious dispute between them being as to whether or not the evidence in this case sustains the finding of the trial court, to the effect that at the time of the conveyance in question there existed a confidential relationship between Bradley and the defendant.

Before considering that point it may be well to say that the evidence in the record abundantly supports the finding of the trial court that the conveyance was made by Bradley to the defendant upon the understanding that the property was to be held in trust and to be reconveyed to the grantor upon demand. Bradley lived in Porterville; the defendant in San Francisco, where the property was situated. According to the former's testimony, after the conflagration in San Francisco in the year 1906, he felt disposed to do what he could to aid in the rehabilitation of the city, and accordingly decided to build upon the lot in question, but did not have the ready money with which to do so. Being connected with a bank in Porterville, he deemed it ill-advised to appear in the capacity of a borrower, so he made a grant, bargain, and sale deed of the lot to the defendant, upon the understanding that she would borrow a certain sum of money from the Hibernia Bank on her note, giving as security therefor a mortgage on the property, and at any time thereafter, upon demand, would reconvey it to him. According to the remainder of the evidence, including numerous letters from defendant to Bradley, addressed to him at Porterville, it appears that she succeeded in obtaining the suggested loan, and then proceeded, according to an evident arrangement between them, to superintend the construction of the proposed building according to plans and specifications submitted to and adopted by Bradley. All the contracts for the erection of the building were submitted to him by defendant for his approval. Many of the payments on account of the work were made by his personal checks. Other payments were made by her out of the borrowed money, and none were made without his knowledge and consent. After the building was finished the rents to be charged for the various stores and flats into which it was divided, and the

selection of an agent to care for the property, were decided by him. Contemplated reductions in rent were submitted by defendant to him. In this connection she said in one of her letters: "Let me know your prices." In another she said: "After attending to a little business of my own I went to the Hibernia Bank to look after your business," referring to the Gough Street building. In a third letter, speaking of certain alterations in the structure, she wrote: "He asked my opinion but I could not commit myself, but told him he should have to notify you . . . It is hard for me to do or say anything when you are the one to be suited."

These are but instances of many similar expressions by the defendant in her letters to Bradley covering a period of about two years. During that time all her acts and conduct with reference to the property were consistent with the claim of Bradley, and inconsistent with her present claim of ownership.

Coming now to the assertion of defendant that the evidence does not sustain the finding of the court that at the date of the conveyance defendant was Bradley's confidential agent, and that he was induced to make the deed by the confidence which he reposed in her, and the belief thereby engendered that she would perform her promise to reconvey to him upon demand, a letter written by her to Bradley prior to the conveyance shows that at that time Bradley must have reposed great confidence in the defendant and that they entertained for each other a strong affection. That this condition existed at the time of the conveyance in November, 1906, is shown in nearly all of her many letters written while the building on Gough Street was in course of construction and thereafter. While those letters were, in part, of a business nature and business-like, they still indicate that the relations between the parties were close, intimate, and confidential. According to her own testimony, for several years prior to the conveyance she and Bradley were engaged to be married, and they in fact were married in March, 1909. From the facts narrated it certainly cannot be held that their relations were not confidential, nor that defendant was not the confidential agent of Bradley at the very time of the conveyance of the property. There are certain relationships from the existence of which the law infers special confidence, such as those of husband and wife, parent and child, guardian and ward, counsel and client, etc., but it also exists in numerous cases where the facts proven

will warrant the inference. (*Brown v. Mercantile T. & D. Co.*, 87 Md. 377, [40 Atl. 256]; *Thomas v. Whitney*, 186 Ill. 225, [57 N. E. 808, 810]; *Stepp v. Frampton*, 179 Pa. St. 284, [36 Atl. 177, 179].) If these parties had been married at the time of the creation of the trust, the law would have presumed the relationship to be confidential, and the oral trust, therefore, enforceable; yet here the evidence shows that the confidence reposed was greater before than after marriage. We think that the trial court's conclusion that there existed at the time of the conveyance a confidential relationship between the parties is abundantly supported by the evidence. The judgment is affirmed.

Beasley, J., *pro tem.*, and Zook, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 15, 1918.

---

[Civ. No. 2461. First Appellate District.—May 16, 1918.]

BRADLEY COMPANY (a Corporation), Appellant, v.  
EMMA R. BRADLEY, Respondent.

**TRUST—REPUDIATION—USE OR OCCUPATION OF PROPERTY WITHOUT CHARGE—TRUSTEE NOT ENTITLED.**—A trustee who fraudulently refuses to reconvey property to its legal owner, and who repudiates the trust, is not entitled to use or occupy any part of the trust property free of charge.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. Jas. M. Troutt, Judge.

The facts are stated in the opinion of the court.

Stoney, Rouleau & Stoney, and Orville C. Pratt, Jr., for Appellant.

Charles Baer, for Respondent.

KERRIGAN, J.—In this action plaintiff sought to have the defendant declared an involuntary trustee for the plaintiff

of certain real property described in the complaint, and to compel a conveyance thereof to the plaintiff, and an accounting for its rents and profits since February 28, 1910.

On the main issue in the case judgment went in favor of the plaintiff, ordering in its favor a conveyance of the property. Defendant appealed therefrom, and said judgment has this day been affirmed by this court. Plaintiff also took an appeal from said judgment, being dissatisfied with that portion thereof which, as the result of the accounting had, awarded to the defendant the sum of \$800.21, and gave to her a lien upon the real property for that amount, and this is the appeal which is now before us.

The sole point made by plaintiff is that this provision of the judgment is not supported by the findings.

Summarized, the findings show that prior to February 28, 1910, the defendant held the property described in the complaint in trust for the plaintiff; that on that date she repudiated her trust; that since that time down to June 18, 1915, when the court's decision was made and filed, she had received as rents for the property certain sums of money, and had made various disbursements on account thereof, with which she was duly debited or credited; that aside from the collection of these rents by her she had during the period mentioned occupied and used a flat constituting part of the real property, and that the reasonable value of such use and occupation was the sum of one thousand six hundred dollars. The court, however, in its conclusions of law, did not charge her with this one thousand six hundred dollars.

In this regard, we think, the court committed an error as a matter of law, and that the judgment, instead of awarding to the defendant as the result of the account so taken the sum of \$800.21, should, upon the findings in favor of the plaintiff, have decreed the payment to it by the defendant of the sum of \$799.79.

It would seem to be too clear to require the citation of authority that a trustee, who "fraudulently refuses" to reconvey property to its legal owner and who repudiates the trust, is not entitled to use or occupy any part of the trust property free of charge; but if the citation of authority be deemed necessary, see *Fricker v. Americus Mfg. Co.*, 124 Va. 165, [52 S. E. 65]; secs. 2273, 2275, Civ. Code.



Defendant does not controvert this as a correct statement of a legal principle, but contends that plaintiff is not in a position to avail itself of this rule of law on the face of the record. There is no merit in her contention in this behalf that the findings relied upon by plaintiff are of probative facts. They are true ultimate facts. It is clear from these findings, which are quite full, that the court struck an erroneous balance by failing to charge the defendant with the rental value of over five years of that part of the trust property which she occupied in defiance of and to the exclusion of plaintiff.

It appearing from the face of the record that the court committed error in not charging the defendant with the amount which it found to be the value of her use and occupation of part of the premises, and that the error is susceptible of correction by this court without requiring a new trial of the issues, it is ordered that the judgment appealed from be modified in the following particulars, namely, that the conveyance to the plaintiff ordered by the judgment shall be made free and clear of any lien in favor of the defendant; that the portion of said judgment which decrees that the defendant owes nothing to plaintiff and that the plaintiff is indebted to the defendant in the sum of \$800.21 shall be stricken out, and that said judgment shall provide that the plaintiff shall recover from the defendant the sum of \$799.79. As thus modified the judgment is affirmed.

Beasly, J., *pro tem.*, and Zook, J., *pro tem.*, concurred.

---

[Civ. No. 2364. First Appellate District.—May 16, 1918.]

BRADLEY COMPANY (a Corporation), Appellant, v.  
EMMA R. BRADLEY, Respondent.

**PLEADING—EJECTMENT—ENFORCEMENT OF TRUST—CONCURRENT MAINTENANCE OF ACTIONS.**—An action in ejectment and an action to enforce an alleged trust as to the same parcel of land may be maintained concurrently.

**EJECTMENT—CROSS-COMPLAINT QUIETING TITLE—VERDICT ON ISSUES RAISED—FAILURE TO ADOPT—UNSUPPORTED JUDGMENT.**—In an action in ejectment to recover two parcels of land, in which the

defendant filed a cross-complaint to quiet title to one of such parcels, a judgment quieting such title cannot be sustained where the cause was tried by a jury and the court did not adopt the verdict or make findings in conformity therewith, although the parties stipulated that the fate of the issues raised by the cross-complaint should be governed by the verdict.

**ID.—EQUITY CASE—ADOPTION OF VERDICT—DUTY OF COURT.**—In an equity case, or on an equitable issue, the verdict of the jury must be expressly adopted by the court in some unmistakable manner, and findings made by it in conformity to such verdict or in rejection of it, or else the judgment will be reversed as having nothing to support it in such a case or on such an issue.

**ID.—JUDGMENT—QUIETING TITLE TO TWO PARCELS OF LAND—SCOPE OF CROSS-COMPLAINT.**—In an action in ejectment to recover two parcels of land, a judgment in favor of defendant quieting title to both parcels upon a cross-complaint which sought to have the title quieted as to one parcel only is unwarranted.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco, and from an order refusing to vacate such judgment. George H. Cabaniss, Judge.

The facts are stated in the opinion of the court.

Stoney, Rouleau & Stoney, and Orville C. Pratt, Jr., for Appellant.

Charles Baer, for Respondent.

**KERRIGAN, J.**—This is an appeal from an amended judgment in an action in ejectment and from an order refusing to vacate such judgment.

A brief statement of the facts involved will be conducive to a clearer understanding of the three appeals now pending in this court between these parties in regard to certain property which is the subject of their contention.

Prior to the tenth day of November, 1906, and to the commencement of any of the actions (three in number) pending between these parties, plaintiff's assignor, Richard Bradley, was the owner of two pieces of real property situated in San Francisco. On the date mentioned Bradley made a conveyance of one of these parcels—designated in the record as the Gough Street property—to the defendant, who was at that time single and bore the name of Mrs. E. R. Buxton. The

conveyance was in trust for certain purposes, and the property was to be reconveyed to Bradley upon demand. Thereafter, desiring to procure a decree establishing title to these two pieces of property under the so-called McEnerney Act, and appreciating that it would be more economical to attain this object by one action rather than two, Bradley conveyed to the defendant the parcel of land designated in the record as the Butchertown lot, with the alleged understanding in this instance as in the other that the property would be reconveyed to him. Prior to these transactions the defendant was engaged to marry Bradley, and they were in fact married about three years after the conveyance to her of the Gough Street property. Later they became estranged, and Mrs. Bradley commenced an action for divorce against her husband. About this time she denied her trust relation to the properties, claiming to be the owner of both parcels, and that as to the Gough Street piece she had paid Bradley a certain sum for it. On April 9, 1911, Bradley's assignee (plaintiff) commenced an action against the defendant to enforce the alleged trust as to this parcel. Thereafter, in June, 1911, the plaintiff, not being content to rest on that equitable suit alone, and believing too that a certain deed made by the defendant reconveying the lots should, under the attending circumstances, be deemed to have been delivered to Bradley, in which event the equitable suit would fail, commenced a second suit—the present one—counting on a legal title to both lots.

That it is proper to maintain these two actions concurrently is not disputed. (*O'Connor v. Irvine*, 74 Cal. 435-441, [16 Pac. 236]; *South San Bernardino Land etc. Co. v. San Bernardino Nat. Bank*, 127 Cal. 245-247, [59 Pac. 699].) In a third suit, filed February 27, 1915, plaintiff sought to enforce the trust as to the Butchertown parcel and to compel its reconveyance by defendant. The status of this case is not before us.

As to the trust suit, which was filed first, a demurrer to the complaint was sustained, but upon appeal the order sustaining the demurrer was, in 1915, reversed. (*Bradley Company v. Bradley*, 165 Cal. 237, [131 Pac. 750].)

The present action, being the second one commenced, was tried first, the trial being had before the court sitting with a jury. The verdict went for the defendant, and judgment thereon was entered in her favor on April 7, 1914. On Octo-

ber 6th of that year the trial judge signed an order amending this judgment, which order was not filed or entered in the judgment book until June 21, 1915. In the meantime the parties went to trial in the trust suit, involving the equitable ownership of the Gough Street property. Judgment therein went for the plaintiff, and the same was entered in June, 1915. The appeals are here on separate records, and will be separately considered.

With this introductory statement we will now review the record in the first action tried, namely, the action in ejectment covering both pieces of property.

The complaint in this action was in form an ordinary complaint in ejectment, in which it is alleged that on and ever since the twentieth day of January, 1908, the plaintiff was the owner and entitled to the possession of the two parcels of land already several times referred to, and that on that date the defendant unlawfully and without right or title entered into possession of the premises and ejected the plaintiff, and has ever since unlawfully withheld the possession thereof from the plaintiff. The prayer was for the restitution of the premises and for damages. In defendant's third amended answer and cross-complaint she first denied the material averments of the complaint, and alleged that she is the owner and in possession of the property involved. She next set forth a matter of special defense, which is unimportant on this appeal. Finally, by way of cross-complaint, she alleged that there was another action pending between the same parties covering the Gough Street property, referring to the action to enforce a trust as to that parcel. She also made the usual averments appropriate to an action to quiet title, setting forth in part that the plaintiff asserted a claim to that property adverse to her title; that such claim was wholly without right and was subject to her title, and that she was the owner of the property and entitled to the possession thereof, and prayed that her title be quieted. To this cross-complaint the plaintiff filed an answer, denying the material allegations thereof.

The cause was tried, and after the testimony was all in and the court had instructed the jury it was stipulated by the parties, at the suggestion of the trial judge, as we understand the matter, that the fate of the issues raised by the cross-complaint and answer thereto should be governed by the verdict of the jury upon the issues framed by the complaint and answer; that

the verdict on these issues should be regarded as a determination in favor of the prevailing party on all the issues raised by all the pleadings.

The jury found for the defendant. One week later, on April 7, 1914, and after a discussion with counsel for the plaintiff as to the scope of the stipulation, counsel for the defendant caused a judgment to be entered in favor of defendant in accordance with the tenor of the verdict and without reference to the intent, whatever it may have been, of the stipulation. Six months later, however, and without notice to the plaintiff, counsel for the defendant obtained from the trial judge an order amending the judgment, incorporating therein the stipulation entered into by the parties at the conclusion of the trial. The amended judgment was made to read in accordance with the prayer of defendant's cross-complaint, and her title to both pieces of property was quieted against all claims of the plaintiff. Eight months after the order amending the judgment was made and fourteen months after the original judgment was entered the amended judgment was filed. Thereafter, a motion to set aside the amended judgment having been denied, this appeal was taken.

Notwithstanding the issues that the pleadings may be said to have raised, a review of the record shows that the case was tried exclusively upon the issues framed by the complaint and answer, the important one being as to whether or not the defendant had reconveyed the property to Bradley. Plaintiff showed that the defendant, being the legal owner of the two parcels of property on May 5, 1908, did about that time put in a safe deposit box, to which she gave Bradley access by sending him a key thereto, a deed of conveyance to him of those parcels duly acknowledged; that thereafter Bradley on two different occasions looked at the deed, held it in his hands, and replaced it in the box, from which it was thereafter taken and destroyed by the defendant. The latter, on the other hand, testified that she bought the Gough Street property from Bradley for a valuable consideration, and that the deed of conveyance claimed by plaintiff to have been delivered to Bradley by her was put in the box as stated, but with the understanding that it was to be deemed delivered to him only in case he survived her. She further testified that this arrangement had been rescinded on account of a loss of confidence in Brad-

ley which she suffered after her marriage to him, whereupon she removed and destroyed the deed.

It appears that some evidence crept into the record briefly disclosing the circumstances *pro* and *con* under which the parcels of property were conveyed to the defendant; but the sole contested question in the case in its last analysis was as to whether or not from the facts narrated it should be held that there had been a delivery to Bradley of the deed which had been placed by the defendant in the safe deposit box. No evidence was introduced for the purpose of showing, nor was the case tried on the theory, that the defendant had and plaintiff did not have the equitable title to the property. The record affirmatively shows that throughout the trial no mention was made of the equitable issue raised or purported to be raised by the amended answer and cross-complaint of the defendant and plaintiff's answer thereto, until just before the case was submitted to the jury, when the suggested stipulation heretofore referred to was made by the parties. Under these circumstances it would appear, granting that the stipulation is as broad in its scope as claimed by the defendant, that plaintiff's consent thereto was an excusable inadvertence. Indeed, its possible scope was, apparently, not understood by either party until shortly after the verdict, when it occurred to defendant's counsel that perhaps they were entitled to a judgment in the terms of the amended judgment, and they asked for a stipulation permitting such a judgment to be entered; but counsel for the plaintiff took the position that such a judgment would not be supported by the evidence, that therefore it would be nugatory, and, if entered, they would at once appeal from the same. Defendant's counsel at the time acquiesced in this view, and caused to be entered a judgment in accord with the verdict of the jury. Six months later, however, counsel for defendant, without notice to plaintiff, procured an amended judgment in conformity with the terms of the stipulation referred to, and fourteen months thereafter caused the same to be filed, a decision having meanwhile been rendered in the trust suit in favor of plaintiff.

From what has been said it follows that the verdict on defendant's cross-complaint, if given the scope claimed for the stipulation, is not supported by the evidence in the case.

But there is another point fatal to the amended judgment. Granting that the court could amend the original judgment

without notice and while an appeal was pending; granted that on the pleadings the issue as to plaintiff's equitable claim was presented to the jury for its consideration; and granting that there was evidence on such issue, upon which a verdict in favor of the defendant could have been based, still we think the part of the judgment giving defendant the relief prayed for in her cross-complaint cannot be sustained, for the reason that the issues which it raised, and the relief therein demanded, were purely equitable, so that the verdict on the cross-complaint was merely advisory. The authorities on this question are numerous and uniform. They are all to the effect that in an equity case, or on an equitable issue, the verdict of the jury must be expressly adopted by the court in some unmistakable manner, and findings made by it in conformity to such verdict or in rejection of it, or else the judgment will be reversed as having nothing to support it in such a case or on such an issue. (See *Warring v. Freear*, 64 Cal. 54, [28 Pac. 115]; *Learned v. Castle*, 67 Cal. 41, [7 Pac. 34]; *Haggin v. Raymond*, 67 Cal. 302, [7 Pac. 721]; *Bell v. Marsh*, 80 Cal. 411, [22 Pac. 170]; *Cummings v. Ross*, 90 Cal. 68, [27 Pac. 62].) An inspection of the record in the present case discloses that no such findings were ever made by the court; and it appears that they were never waived by the appellant, and that the court did nothing in the way of adopting the verdict of the jury so as to give its judicial sanction to the decision. Under these circumstances that part of the amended judgment which gave effect to the stipulated verdict on the cross-complaint has no legally sufficient findings to support it, and it must be reversed for want of such findings.

Finally, it remains to be noted that the cross-complaint, in terms, sought to have the title quieted to the Gough Street property only, and no relief could, therefore, be granted thereunder so far as the Butchertown parcel was concerned. The amended judgment purports to grant such relief. Furthermore, even if such relief were permissible under the pleadings, there is no evidence in the record to sustain it. As to this lot the defendant did not claim to have bought it, as she did with reference to the Gough Street lot; and the uncontradicted evidence is that it was conveyed without consideration to defendant by Bradley for the purpose of permitting one decree to be obtained covering both lots, as before stated, and upon

the obvious understanding that she should reconvey it to him when that object had been accomplished.

The judgment and order are reversed.

Beasley, J., *pro tem.*, and Zook, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 15, 1918.

---

[Civ. No. 2281. Second Appellate District.—May 16, 1918.]

CHARLES F. REUTER, Respondent, v. SAN PEDRO, LOS ANGELES & SALT LAKE RAILROAD COMPANY (a Corporation), Appellant.

**NEGLIGENCE—ACTION FOR LOSS OF PROPERTY—FIRE FROM LOCOMOTIVE—**

**EVIDENCE—BURDEN OF PROOF.**—In an action against a railroad company for damages for loss of property from fire set by one of its locomotives, the gist of the action is negligence, and the burden of proof is upon the plaintiff.

**RAILROAD CORPORATIONS—LIABILITY FOR FIRES.**—A railroad company is not an insurer at all events against the consequences of fire set by its locomotives, but it is only liable for fires negligently caused by it, and the facts upon which the liability rests cannot be established by mere conjecture but must be proved by satisfactory evidence.

**ID.—APPEAL—SCOPE OF REVIEW.**—In an action against a railroad company for damages for loss of property by fire negligently set by one of its engines, the appellate court cannot, on appeal from the judgment, take the place of the trial court for the purpose of determining whether the findings are supported by a preponderance of the evidence, but will consider the evidence solely for the purpose of determining whether or not the essential findings of fact are supported by satisfactory evidence tending substantially to establish the facts as found.

**ID.—NEGLIGENCE OF DEFENDANT—FINDINGS SUPPORTED BY EVIDENCE.**—

In this action against a railroad company for damages for loss of property from fire negligently set, it is *held* that there was satisfactory evidence to support the findings that the fire which destroyed the property had its origin in fire which escaped with



the smoke from the engine of the defendant, and that the fire and the consequent damage was occasioned by careless and negligent management of the engine.

APPEAL from a judgment of the Superior Court of San Bernardino County. J. W. Curtis, Judge.

The facts are stated in the opinion of the court.

James E. Kelby, and A. S. Halsted, for Appellant.

McNabb, Hartzell & Hodge, for Respondent.

CONREY, P. J.—Action to recover damages on account of loss of property, caused by fire negligently set out, through negligence of the defendant. On the nineteenth day of November, 1914, the plaintiff was the lessee and in possession of certain real property located in San Bernardino County and was the owner of certain personal property located thereon of the value of \$693.50. On that day and for some years prior thereto the defendant corporation was operating a railroad over the right of way and tracks of the Atchison, Topeka & Santa Fe Railway Company, which right of way passes within a distance of two and one-half miles northerly from the premises on which said personal property of the plaintiff was located. On that day the defendant company was operating a train running easterly between the city of San Bernardino and the town of Daggett. While running through the territory north of the plaintiff's premises, the train passed through the station Devore, northwesterly through the station called Keenbrook, and thence northwesterly to the station of Alray. It is four and seven tenths miles from Devore to Keenbrook and about twelve miles from Devore to Alray. There is an upgrade of about two per cent from Devore to Alray.

In addition to the facts above stated, the findings of the court show the following facts, all of which are alleged in the complaint and denied in the answer: Finding V states that on the nineteenth day of November, 1914, while the defendant was engaged in running one of its trains on said right of way north of the premises of the plaintiff, at a time when a high wind was blowing in a southerly direction, the defendant so negligently and carelessly managed its train and failed to

employ suitable appliances to prevent the escape of soot, sparks of fire, and fire from the engines hauling the train; that fire from one of the engines drawing the train was suffered to escape and did escape from the engine; that the defendant negligently and carelessly allowed burning soot, sparks, and fire to be thrown and dropped from the engine and the same was carried by the wind and caused to fall upon dry grass and brush situate on the property adjacent and contiguous to the right of way over which the train was being operated; that this property to which said fire was communicated was adjacent to and in a northerly direction from the premises and property of the plaintiff. Finding VI states that the fire so set by reason of the defective engine and the carelessness and negligence of the defendant in operating said engine was by reason of such negligence and carelessness allowed to spread, and did spread, and was driven in a south-westerly direction from the point where it was first allowed to escape by the defendant, and spread and burned over and upon the premises in possession of the plaintiff, in consequence whereof all of said personal property of the plaintiff was burned and destroyed, to plaintiff's damage in the sum of \$693.50.

The defendant appeals from the judgment. Briefly stated, the substance of its contentions is that there is no evidence which tends in any way to connect the defendant with the fire; and that there is no evidence tending to show negligence on the part of the defendant or its employees with respect to the construction or condition of its engines or with respect to their operation thereof.

Counsel for appellant have directed our attention to certain rules, concerning which at the outset we will say that they are pertinent to this case. The gist of the action is negligence and the burden of proving negligence as alleged was upon the plaintiff. A railroad company is not an insurer at all events against the consequences of fire set out by its locomotives; it is only liable for fires negligently caused by it. The facts upon which the liability of the defendant rests must be proved by satisfactory evidence; they cannot be established by mere conjecture.

Assuming that the foregoing propositions correctly state the law, we have carefully examined the evidence contained in the record before us. The witness Bortz was a section foreman

for the Santa Fe Railway Company, who on the nineteenth day of November, 1914, at the noon hour, was on the west side of the east-bound track and about 150 feet off the right of way. What is called the east-bound track was at that point the southerly track of the railroad, and on that track what is called an east-bound train would at that point be moving in a northwesterly direction. Bortz testified that at twelve minutes past 12 o'clock the Salt Lake train passed him. Immediately thereafter he started down the track and within a minute after that time he discovered fire off the right of way and distant from him about a quarter of a mile. A strong north wind was blowing at the time. Bortz then went down to Devore station to report to the dispatcher to send men to put out the fire. Devore station is a mile and a quarter from the point where Bortz was located when he saw the fire. On his way to Devore he saw a man walking across the bridge toward Devore. Bortz was traveling in a gasoline handcar or motor car.

The witness Clock testified that at noon of that same day he was walking up the track from Devore station, and was passed by the Salt Lake train at the point where the county road crosses the Santa Fe right of way. The train had two engines and there was a great deal of heavy, black smoke coming from the first engine. There was an extremely high north wind which was carrying the smoke away in a southerly direction. Between five and ten minutes after the train passed the witness discovered a fire burning. He did not see any evidence of the fire before the train passed. This witness made two different statements with respect to the distance from the railroad of the fire that he saw, the greater distance being about 150 feet from the right of way.

It is admitted that all of the Salt Lake engines and all of the Santa Fe engines using that right of way at that time were oil-burning engines. The witness Rinder testified that in the evening on a day in October, 1914, he saw a fire started by a Salt Lake engine in front of his house, which was a mile and a half above Devore. He saw soot like long pieces of rags coming from the smokestack and coming inside his fence, where it set a fire. He saw smoke from the engine and sparks and flakes of soot flying, and saw the fire right after the train passed. The place where the fire was set out was from 125 to 175 feet from the railroad track.

The witness Eubanks was a locomotive engineer and familiar with the workings of oil-burning engines. He testified that when an oil-burning engine is in good working order and properly managed by the engineer and fireman, it would not throw any black smoke, but the smoke coming from the engine would be clear. He testified that he had seen an engine throw burning carbon from its smokestack and on one occasion saw that carbon ignite other materials. He was familiar with the process of sanding out flues of locomotives for the purpose of removing carbon and what gathers in the flues. During the progress of sanding out flues the engine gives out smoke.

The witness Todd had many years' experience in running locomotive engines and ran an oil-burning engine for about two years. He testified that if an oil-burning engine was in proper working condition and properly managed and handled by the engineer, it would not throw any black smoke, but that the color would be light or steam color; that an engine will choke up if it is not working properly or is not in a clean condition; that the material that accumulates in the flues is carbon, the same as any accumulation from fuel; commonly speaking, it is soot. The witness testified that he had seen what he called carbon or soot exhausted from the smokestack of an engine afire and carry fire to the ground, on some occasions. Such occasions would happen when the engine was sanded out and the carbon would cut loose. The effect of that operation was to make the color of the smoke black.

Several other witnesses testified concerning their observations of trains of the defendant and of the Santa Fe Railway Company in and near the city of San Bernardino. According to these witnesses, they have seen smoke, soot, and fire thrown from oil-burning engines and have seen fires started by them.

It is also shown in evidence that on the nineteenth day of November, 1914, trains of the Santa Fe Railway Company passed Devore at twenty-eight minutes past 11 A. M. and at 14 minutes past 11 A. M.; and in particular, that a Santa Fe west-bound passenger train passed through Devore at two minutes before 12 on that day. Counsel for defendant place a great deal of emphasis upon this last-named train, because it must have passed the place where the fire occurred, and must have passed that point about a quarter of an hour before the defendant's train passed that place. Much evidence was in-

troduced tending to show that when west-bound trains are coming down the grade the process of braking makes the brakeshoes red hot, so that shavings come off on account of the excessive heat, which are likely to set fire to waste along the track, and that such pieces of burning waste might have been carried by the wind to such distance that they might have set the fire complained of by the plaintiff. The defendant also introduced evidence tending to show that its engine was in perfect condition and that it was properly operated. H. H. Harris was the fireman on engine 3703, which was the helper engine, from which, according to the testimony of plaintiff's witnesses, the black smoke came. Harris testified that he sanded the engine out after leaving Devore, but according to his testimony, he completed the sanding out at a point which, according to the scale of the map introduced in evidence, would be about one-third of a mile before the train came to the point opposite the place where the fire was afterward discovered. Harris testified that when he sanded the engine it threw out black smoke, but not in great quantities. All of the witnesses to the point agree that the right of way was clear of grass and brush.

According to the testimony of expert witnesses produced by the defendant, and if their testimony had been accepted as the truth and the whole truth, by the court which tried the case, the fire which destroyed the plaintiff's property could not have been caused by the engines of the defendant or by anything which came from them. For, as stated by counsel for appellant, their testimony is to the effect, among other things, that it is physically impossible for sand or any other substance coming from the stack of an oil-burning locomotive to ignite anything; that it is physically impossible for a piece of waste or wood cast into the furnace to pass out of the fire-box unconsumed; that smoke emitted from a smokestack while an engine is climbing a heavy grade, moving at from twenty-four to twenty-eight miles an hour, is not symptomatic of defect in the engine or its management, since the emission of such smoke is a condition of the mechanical operation of an oil-burning engine while pulling a train; that it is contrary to the laws of nature for any fire that comes through the smokestack of an oil-burning engine to set fire along the right of way, the fuel consumed being one hundred per cent; that the oil-burning engines of defendant are equipped the same

as are oil-burning locomotives wherever used; that it is contrary to natural law for a stream or sheet of fire to leave the smokestack and carry itself 150 to 175 feet.

It must be kept in mind that in considering the merits of this appeal we cannot take the place of the trial court for the purpose of determining whether the findings of the court are supported by a preponderance of the evidence. We consider the evidence solely for the purpose of determining whether or not the essential findings of fact are supported by satisfactory evidence tending substantially to establish the facts as found. "That evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence alone will justify a verdict. Evidence less than this is denominated slight evidence." (Code Civ. Proc., sec. 1835.) Notwithstanding the contention urged upon us, that the findings attacked by the appellant cannot be sustained except by the indulgence of mere conjecture, we have reached the contrary conclusion. It is true that counsel in their discussion of the evidence have raised a number of conjectures which, if approved as of equal weight with the evidence favorable to the plaintiff, might strongly uphold their argument. We have also kept in mind the fact that the witnesses who saw the engine and its smoke, on the occasion in question, under a noonday sun, did not testify that they saw any sparks, or flame, or burning soot. Nevertheless, our reading of the testimony leads us to the conclusion that there was satisfactory evidence from which the trial court had the right to become convinced and to find that the fire which destroyed the plaintiff's property was communicated thereto by fire which originated in the grass or brush adjacent to the right of way of the defendant; that these fires had their origin in fire which escaped with the smoke from the engine of the defendant; that the escape of the fire, and the consequent damage to the plaintiff, was occasioned by careless and negligent management of its engine by the defendant. From these facts, taken in connection with the other facts about which there is no controversy, to which we have referred, it follows that the plaintiff was entitled to recover.

The judgment is affirmed.

James, J., and Works, J., *pro tem.*, concurred.

[Civ. No. 2450. First Appellate District.—May 17, 1918.]

**ARTHUR G. SCHOLZ, Respondent, v. P. J. GARTLAND,  
Appellant.**

**ACTION FOR ARCHITECT'S SERVICES—VERDICT SUPPORTED BY EVIDENCE.—**

In this action for architect's services, it is held that the verdict was amply warranted by the evidence, and that there was no error in the refusal of certain instructions and the modification of others.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. John Hunt, Judge.

The facts are stated in the opinion of the court.

William A. Kelly, for Appellant.

A. J. Treat, for Respondent.

**THE COURT.**—In this action for services rendered by plaintiff as an architect to the owner of certain property, who contemplated erecting a building thereon, plaintiff had judgment, from which defendant appeals upon two grounds: First, that the evidence on behalf of plaintiff was so inherently improbable as to amount to no evidence at all; and, second, that there were certain errors in the instructions given by the court to the jury.

We do not consider it necessary to review the facts of the case. We have carefully examined the transcript, and conclude that the verdict of the jury was amply warranted by the evidence.

We are also satisfied that the instructions given by the court correctly stated the law applicable to the case, and that there was no error in the refusal of certain instructions and the modification of others requested by the defendant.

Judgment affirmed.

[Civ. No. 2194. Second Appellate District.—May 17, 1918.]

**FELIX R. MORNEAULT**, Respondent, v. **NATIONAL SURETY COMPANY** (a Corporation), Appellant.

**ATTACHMENT—ACTION ON BOND—PREVIOUS SATISFACTION OF JUDGMENT FOR COSTS—TIME OF COMMENCEMENT OF ACTION.**—An action will lie on an undertaking given on the issuance of a writ of attachment when the judgment in favor of the defendant for costs has been satisfied, notwithstanding the time for appeal from the judgment has not expired.

**ID.—ATTACHMENT OF AUTOMOBILE—MEASURE OF DAMAGES.**—In such an action, the attached property being an automobile and kept by the plaintiff, for sale only, the plaintiff is only entitled to damages for depreciation in value for the time it was held under attachment, and is not entitled to any compensation for being deprived of its use, since the damages depended upon the use to which the owner of the property would put the same had his possession of it been undisturbed.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. John W. Shenk, Judge.

The facts are stated in the opinion of the court.

**Benjamin E. Page, Arthur C. Hurt, and Arthur F. Coe**, for Appellant.

**Eugene A. Holmes**, for Respondent.

**JAMES, J.**—This is an appeal from a judgment entered in favor of the plaintiff and against the defendant for the principal sum of five hundred dollars. The alleged liability of the defendant to the plaintiff arose by reason of the following facts: On about the 15th of April, 1915, one Dennis commenced an action against respondent herein, seeking to recover the sum of one thousand dollars. Dennis took out a writ of attachment in the action, giving a bond in the sum of five hundred dollars to indemnify the plaintiff for any damages which he might suffer by reason of the issuance of the writ. The undertaking on attachment was in the usual form and was conditioned that "the said plaintiff will pay all costs that may be awarded to the said defendant and all damages



which the said defendant may sustain by reason of the said attachment, not exceeding the sum of five hundred and no/100 (\$500.00) dollars. . . .” Upon receiving the writ of attachment the sheriff proceeded to levy upon an automobile owned by respondent here, who was the defendant in the case mentioned, and the automobile was held under attachment from April 16, 1915, to August 2d of the same year. On the latter date judgment was entered in favor of this respondent in the attachment suit, which judgment was that the plaintiff should take nothing and that defendant recover costs in the sum of \$20.75. The costs were paid and the judgment was thereby satisfied. This action, brought to recover from the surety on the attachment bond damages alleged to have been sustained by the defendant in the attachment suit by reason of the attachment, was commenced on October 25, 1915.

Appellant's first point is that this action cannot be maintained because the time allowed within which an appeal might be taken from the judgment in the attachment suit had not expired when the complaint of this plaintiff was filed. We have already noted that the judgment in the attachment suit was in favor of the defendant for costs and that the costs were paid and the judgment satisfied. We do not think that after voluntarily satisfying the judgment the plaintiff in the attachment suit could have maintained an appeal from that judgment. If he could not, then the judgment was final upon satisfaction being entered. Section 1049 of the Code of Civil Procedure provides that an action is deemed to be pending from the time of its commencement until its final determination upon appeal, “or until the time for appeal has passed, unless the judgment is sooner satisfied.”

The main contention urged on the part of the appellant goes to the question of the sufficiency of the evidence to sustain the findings made by the court. The trial judge found that plaintiff had been deprived of the use of the automobile from April 16 to August 2, 1915, and that said use during said period was reasonably worth the sum of \$545. He found that plaintiff was damaged further by reason of the attachment in the amount of five hundred dollars, that sum representing the depreciation in value of the automobile during the period just mentioned. The total amount of damages found to have been sustained was the sum of these two items, to wit: \$1,045. As the maximum of the undertaking was five hundred dollars,

judgment was entered for that sum. It seems very clear to us that plaintiff could not be allowed compensation for being deprived of the use of his automobile and also for the amount of depreciation in value of the machine. We think that the damages to be recovered in an action of this kind depend upon the use to which the owner of the property would put the same had his possession of it been undisturbed. If the evidence in this case shows that the plaintiff was using his automobile for his convenience or in his business, then the rental value of the same would seem to be a proper basis upon which to estimate the damages for its detention. On the other hand, if the evidence shows that the plaintiff held the automobile for sale, making no such use of it as has been described, then any depreciation in its value might properly furnish a like basis for the estimation of damages. Under conditions first instanced, it would not appear that the attachment defendant would have sold his machine had he had it in his possession, with liberty so to do; hence he would have lost nothing by reason of depreciation. We think the evidence in this case negatives any claim for the value of the use of the automobile and that the evidence shows that defendant at the time the vehicle was taken from his possession was holding it for purposes of sale only. On this point he said: "I did not drive the car much during the first part of the year 1915, you know, because I wanted to sell it, but I left it in the garage a while for sale. I left it there two or three weeks, I guess. I took it out one time; I got an opportunity and took it out. I went down to see a piece of real estate at Monrovia. I was trying to exchange some property I had north and went down there to see about an exchange of the property for the automobile. . . . I always borrowed a license when I was using the car. I think three times was all that I used it while I had it in the garage. When I took it from the garage I used their number. I had different parties looking at it and I put it on sale. I was not using it the first part of the year otherwise than demonstrating it and showing it to customers. I did not use it otherwise prior to April, 1915. I was offering it for sale; I wanted to sell it, as I was getting short of money." The court: "What was the value of the car when the sheriff took it? A. I refused \$850 for it just a few days before they took it; they offered me in the garage for the car; I wouldn't take it; I wanted a thousand dollars, and all they

offered me was \$850, and I didn't take it. I sold it for \$450 cash and a lot in Santa Monica. I was figuring the lot was worth two hundred dollars. . . . " Plaintiff nowhere testified that had he remained in possession of the car he would have made use of it in any way at all except to offer it for sale. That he had no such other use for it is corroborated by the fact that upon regaining possession of it he proceeded to sell it. The result of this testimony, we think, must be to eliminate from consideration altogether the finding of the court as to what the rental value of the machine was during the period from April 16th to August 2d. The fact, of course, is to be noted that as the maximum liability on the bond was five hundred dollars, if either item of damage as found by the court is sustained by the evidence, the judgment will be supported, for the value of the use is fixed at \$545 and the depreciation in value at five hundred dollars in the court's findings. We then turn to a consideration of the evidence touching the value of the property. It was necessary for the plaintiff to show both the value of the automobile when taken under the writ and its value when returned to him. As to that matter the court made this finding: "That the said automobile belonging to said Morneault and so attached was, upon the sixteenth day of April, 1915, worth \$1,150. That upon the second day of August, 1915, the date when said automobile was returned to the possession of the plaintiff herein, it was worth \$650 and no more." It must be said that there is some evidence to sustain the finding as to the value of the automobile as fixed by the court as of the date when the attachment was made as being \$1,150. Plaintiff's witnesses were contradictory upon that point. A witness who had long experience in handling the particular kind and manufacture of machine as that of the plaintiff testified that the machine when he saw it before the attachment was levied was worth \$850. A witness who had never seen the machine stated that, basing his opinion upon a description of the car as given by the first witness, he would say it was worth about \$1,150. Considerable testimony was given as to the rate of depreciation of the machine, but an examination of that testimony will show that it all had reference to a machine in use, a large element of depreciation being "wear and tear." There was no testimony fixing the value of the automobile at the time it was received back by the plaintiff, except that given by the plaintiff himself and which

we have already quoted. That testimony referred to the amount received by the plaintiff when he finally traded the car for \$450 cash and a lot. There is nothing in that testimony which indicates what the market value of the machine was at the time the attachment was released. What the plaintiff actually received for it may have been more or less than its market value. And so, we think, that the finding as to depreciation in value of the car being five hundred dollars lacks support in the evidence.

The judgment appealed from is reversed.

Conrey, P. J., and Works, J., *pro tem.*, concurred.

---

[Civ. No. 1584. Third Appellate District.—May 17, 1918.]

ANTONIO MENDOZA et al., Respondents, v. CENTRAL FOREST COMPANY (a Corporation), et al., Appellants.

**MECHANICS' LIENS—FARM DEVELOPMENT—STRUCTURE—CONSTRUCTION OF CODE.**—Under section 1183 of the Code of Civil Procedure, providing for mechanics' liens on specified improvements "or other structure," farm development consisting of ditches, drains, embankments, and roads, so correlated as to form one harmonious entity designed to convey water to and distribute it over the land, and constituting a permanent improvement thereto, increasing its value, is a "structure."

**APPEAL** from a judgment of the Superior Court of Glenn County. Wm. M. Finch, Judge.

The facts are stated in the opinion of the court.

Frank Freeman, and George R. Freeman, for Appellants.

Harmon Albery, and Duard F. Geis, for Respondents.

**CHIPMAN, P. J.**—Plaintiffs commenced the action to enforce certain service liens against the real property belonging to defendant Central Forest Company. These liens consist of two classes: 1. Labor performed; and 2. Liens for appliances, teams, and power furnished and supplied.

The trial was by the court without a jury and plaintiffs had judgment, from which defendant Central Forest Company appeals.

Appellant states in its closing brief that "since the brief was prepared the laborers have been paid and the judgment has been satisfied so far as it affects the laborers." Appellant asks that the judgment be reversed as to plaintiffs J. A. Davis and Eldon E. Thwaites, whose claims fall under the second class above referred to.

Section 1183 of the Code of Civil Procedure is as follows: "Mechanics, materialmen, contractors, subcontractors, artisans, architects, machinists, builders, miners, teamsters and draymen, and all persons and laborers of every class performing labor upon, or bestowing skill or other necessary services, or furnishing materials to be used or consumed in or furnishing appliances, teams and power contributing to the construction, alteration, addition, to or repair, either in whole or in part, of any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, wagon road or other structure shall have a lien upon the property upon which they have bestowed labor or furnished materials, for the value of such labor done and materials furnished and for the value of the use of such appliances, teams or power, whether at the instance of the owner, or of any other person acting by his authority or under him, as contractor or otherwise; and every contractor, subcontractor, architect, builder or other person having charge of the construction, alteration, addition to or repair either in whole or in part of any building, or other improvement as aforesaid shall be held to be the agent of the owner for the purposes of this chapter."

It is alleged in the complaint "that at all times herein mentioned, the defendant J. S. Westphal was the contractor, agent and representative of the defendant, Central Forest Company, a corporation, in the work and construction under the contract hereinafter mentioned, and represented defendant, Central Forest Company, in that behalf.

"That on the 15th day of May, 1914, said defendant J. S. Westphal, made and entered into a contract with the defendant, Central Forest Company, a corporation, to do the farm development, consisting of plowing, preparation of soil, leveling, checking, ditching, draining and building roads, under and pursuant to the terms and specifications of said contract,

in and upon the above described land, the property of the defendant, Central Forest Company, a corporation; that said contract was in writing and subscribed by the parties thereto, and the same was filed for record in the office of the county recorder of the county of Glenn, State of California, the same being the county in which said property is situate, a copy of which said contract is hereto annexed, marked Exhibit 'A,' and made a part of this complaint.

"That the said defendant, J. S. Westphal, contractor and agent of and for said defendant, Central Forest Company, a corporation, commenced the building and construction of said farm development under and pursuant to the terms and conditions of said contract, and under and pursuant to the specifications and plat thereof attached, on or about the 18th day of May, 1914, and continued said work until on or about the 1st day of September, 1914."

The specific purpose for the development of appellant's tract of land was so to prepare it that it could be seeded to alfalfa and could be readily and economically irrigated. It will be perceived from the provisions of the contract, some of which will presently be stated, that the work to be done constituted a permanent improvement to the land; installed thereby a permanent system for utilizing it for greater profit and greatly increasing its productive capacity, and added to its value certainly at least the contract price for the work, which was \$24 per acre. The character of the work and the necessity for its being carefully planned and supervised by a competent engineer will be seen from the contract itself, under which the work was done, some of its provisions being as follows:

"The said contractor hereby promises and agrees to and with the said company that the contractor will, for the consideration hereinafter mentioned, do the farm development which shall consist of plowing, preparation of soil, leveling, checking and draining, and building roads; the work to be done according to plans shown on the accompanying blue print attached hereto and made a part of this contract; on the south half of the north half of section seventeen, township twenty north, range three west, M. D. B. & M., and agreed for the consideration mentioned to furnish all necessary labor, tools, machinery and equipment for such work; said work to begin within ten days after acceptance of and signing of this contract and to be completed before the 25 day of August,

1914. All of said work to be done under the direction of and completed to the satisfaction of John P. Ryan, the engineer of the Company.

“Consideration: The said Company hereby promises and agrees to and with the said contractor that when and as said work is completed the said Company will . . . well and truly pay or cause to be paid unto said contractor at the rate of \$24.00 per acre of work done; such acreage not to include roads at the rate of \$100.00 per mile for roads built hereunder. . . .

“Order of Work: The contractor shall commence his work at such points as the engineer in charge may direct, and shall conform to said engineer’s orders and directions as to the order of time in which different parts of the work shall be done. . . .

“Change of Plans: The Company shall have the right to make such changes in alignment, dimensions or character of work to be done, as in the opinion of the engineer the interest of the work or company may require.

“Prosecution of Work: Should the contractor fail to begin work within the time required or fail to prosecute the work with not less than forty head of stock, or if at any time the contractor is not carrying out the provisions of this contract in its true intent and meaning, . . . the Company in such case shall have power to terminate the contract or withdraw any portion of the work under said contract; or the Company may employ other parties to carry the contract to completion, or hire such force and tools, appliances, materials and animals at the contractor’s expense as may be necessary for the proper conduct of the work and for the completion thereof. . . .

“In the determination of the question of whether there has been such noncompliance with the terms of this contract as to warrant the termination thereof, the decision of said engineer shall be binding upon all parties.

“Payment of Men: The said parties hereto further agree as follows: That the said contractor shall pay punctually the men who shall be employed on the aforesaid work, and the persons who shall furnish the materials therefor, and before the said contractor shall be entitled to any of the progress or final payments, as herein provided, he shall first satisfy, or cause to be satisfied, all claims for labor expended or materials used, or stock hired, in the construction of said work that may in any

event become a lien upon said property, or may in any way become binding upon or chargeable to the said company, and shall furnish if demanded to the said company a satisfactory evidence that all claims are satisfied. . . .

"In estimating extra work, only the time of the men and teams actually employed, the foreman immediately in charge of the work and the material consumed, shall be considered chargeable to the work. . . .

#### "SPECIFICATIONS.

"Stakes and Marks: All lateral and drain work performed under the terms of this contract shall be indicated by center stakes only, grades shall be given where necessary. The engineer shall give one set of inspection levels when asked for by the contractor. Border checks shall be located by the contractor in accordance with the plans attached.

"Excavation: All excavation shall be deposited in embankment or shall be evenly wasted over adjoining area as directed by said engineer.

"Construction of Embankments: Borrowing for embankments shall be made at such points as said engineer shall direct, the material for the construction of levees may be borrowed where the contractor deems best, keeping in mind that the land between checks shall be level transversely with a continuous slope longitudinally.

"Finish: Tops and slopes of embankments and bottom of cuts shall be finished in a workmanlike manner and be true to line and grade, and ordinary scraper finish being required. No high points shall be left in bottoms or laterals or drains or between border checks. A continuous downward slope shall be demanded on border checks."

The testimony of plaintiff Davis was that the contractor, Westphal, hired from him fifteen mules with their equipment of harness, stretchers, lines, and other appliances—a complete outfit ready to be used and which was used in the development work being done by Westphal under his contract with the defendant corporation. The mules rented to Westphal by plaintiff Thwaites were similarly equipped and so used by the contractor, "grading and scraping and all the development work."

In their reply brief respondents, we think, fairly described this work and its purpose as follows: "When the farm de-



velopment was finally complete its component parts constituted a unified structure, arranged, built, and constructed of earth, with ditches and laterals built from the source of water supply to convey the water to the farm development and with laterals to distribute the water over the land. At regular intervals on the farm development there were checks (small embankments of earth) thrown up parallel to each other for the purpose of holding the water on the parts or portions of the farm development desired; thus, the land between any two of these checks could be irrigated separately and independently of any other unit of the farm development. The land between the checks was required to be level transversely with a continuous slope longitudinally, so as to insure the successful operation of the irrigation system, and in order to comply with the contract. Thus, when the alfalfa in any one unit had been sufficiently irrigated, gates in the lower end of the unit were opened and the water was automatically taken from the unit and removed by gravity away from the farm development. This could be done without interfering with the irrigation of the other units of the system. The land lying between the checks, or small embankments, consisted of specially leveled and highly prepared and cultivated seed beds, and it was in these beds that the alfalfa seed was planted. It is thus readily apparent that the farm development was an entity, consisting of integral component parts, each part of which was necessary and vital to the successful operation of the whole."

We are called upon to decide whether the phrase "or other structure," as used in section 1183, *supra*, may safely be said to apply to a completed undertaking such as was contemplated by this contract.

The court made the following among other findings of fact: "That the completed farm development erected upon the south half of the north half of section 17, township 20 north, range 3 west, Mount Diablo base and meridian, situate in Glenn County, California (the said lands being the lands of the Central Forest Company herein and heretofore mentioned), under or pursuant to the contract of May 15, 1915, heretofore found to have been made and entered into by and between defendant J. S. Westphal and defendant Central Forest Company, a corporation, constitutes and is a structure."

The court also made the following finding as conclusion of law: "That the farm development erected upon the lands of the Central Forest Company, as aforesaid, constitutes and is a structure within the meaning of section 1183 of the Code of Civil Procedure of the State of California."

In *Williams v. Mountaineer Gold Min. Co.*, 102 Cal. 134, [34 Pac. 702, 36 Pac. 388], Mr. Justice Temple, speaking for the court, construed these terms as follows: "The use of the phrase 'other structure' in the above extract (from section 1183) shows that the word 'structure' comprehends all the properties specifically enumerated, and is broad enough to include any similar thing constructed, should the enumeration prove incomplete." The definition found in volume 27, Am. & Eng. Ency. of Law, second edition, page 191, is as follows: "In the broadest sense a structure is any production or piece of work artificially built up or composed of parts joined together in some definite manner; any construction."

What was said in *Caddy v. Rapid Transit Co.*, 195 N. Y. 415, [30 L. R. A. (N. S.) 30, 88 N. E. 747], we think quite true, namely: "In cases like this lexicographers' definitions are useful as guide-posts, but they do not take us to our destination. The statutory meaning of a word or phrase must be gathered from the purpose for which the law containing it was enacted."

In the present case, we think, the definition given by Judge Temple, *supra*, will lead us to our destination. The statute gives the lien to all persons "furnishing materials to be used or consumed in or furnishing appliances, teams and power contributing to the construction, . . . either in whole or in part, of any building, wharf, bridge, ditch, flume, aqueduct, well, tunnel, fence, machinery, railroad, wagon road or other structure . . . for the value of such labor done and materials furnished and for the value of the use of such appliances, teams or power, whether at the instance of the owner, or of any other person acting by his authority," etc.

The farm development here contemplated was a finished piece of work composed of integral parts, some of which the statute expressly designates as structures, and when completed consisted of ditches, drains, embankments, roads, so correlated as to form one harmonious entity designed to accomplish a particular object and constituting a permanent and valuable improvement to the land and necessary to its highest

and most profitable uses. When finished, it stood out as obvious and visible in its usefulness and its purpose as would a house, or barn, or any other of the structures enumerated in the statute. Viewing the statute with that liberality with which we are not only authorized, but by the statute itself we are enjoined to regard it, we feel no hesitancy in holding with the learned trial court that the work to which plaintiffs contributed, as shown, constituted a structure.

Appellant's contention that the only section of the code applicable is section 1191 and that as plaintiffs have not brought themselves strictly within that section, they are without remedy by way of lien and must look alone to the contractor, we do not think maintainable. If, as we think, they have shown that the improvement or farm development toward which they contributed teams for the power necessary to its accomplishment constituted a structure, they had a right to look to section 1183 for relief.

The judgment is affirmed.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 15, 1918.

---

[Civ. No. 1803. Third Appellate District.—May 18, 1918.]

THERESA WEISSHAND, as Executrix, etc., Respondent,  
v. CITY OF PETALUMA (a Municipal Corporation),  
Appellant.

**PLEADING—ACTIONS FOR INJURIES TO PERSON AND PROPERTY—JOINDER IN SAME COMPLAINT.**—In view of section 427 of the Code of Civil Procedure, as amended in 1915, a cause of action for damages to property and a cause of action for injury to health may be joined in the same complaint, where both grow out of and are the direct result of the same tort.

**ID.—ACTION FOR DAMAGES AND INJUNCTION—JOINDER.**—It is not improper to unite a cause of action for damages with a cause of action for injunctive relief.

**MUNICIPAL CORPORATIONS—IMPROPER IMPROVEMENT OF CITY STREET—DAMAGE TO PROPERTY OWNER—PLEADING—IMPROVEMENT UNDER MUNICIPAL AUTHORITY—SUFFICIENCY OF COMPLAINT.**—In an action against a municipal corporation for injuries to person and to property from the improper grading, filling, and improvement of a city street, the complaint is not subject to the objection that it fails to show that the work was done under the authority of the defendant, where it is alleged that the defendant caused the work to be done.

**ID.—DAMAGE TO PROPERTY OWNER—LIABILITY OF MUNICIPALITY FOR IMPROPER STREET IMPROVEMENT.**—A municipal corporation is liable to a property owner for the flooding of his property from the improvement of a street on which his property abuts, where the work was done strictly in accordance with plans and specifications adopted for the work, and such plans and specifications did not provide for adequate means for taking care of the surface waters which would accumulate on the property.

**ID.—FLOODING OF DWELLING—RAISING TO PROPER HEIGHT—PROPER ELEMENT OF DAMAGE.**—In an action against a municipal corporation for damages caused by the alleged flooding of plaintiff's dwelling from the improvement and grading of a street, the expense necessarily incident to the raising of the structure to a height preventing the water from entering the dwelling is an element of damages, notwithstanding the raising increased the value of the premises.

**APPEAL** from a judgment of the Superior Court of Sonoma County. Emmet Seawell, Judge.

The facts are stated in the opinion of the court.

G. P. Hall, and E. J. Dole, for Appellant.

Fred S. Howell, and W. D. L. Held, for Respondent.

**HART, J.**—Plaintiff's testator brought the action to recover damages alleged to have been caused by the improper grading of a street in the city of Petaluma and the consequent flooding of his land. The original plaintiff died and Theresa Weiss-hand, as executrix of his last will, was substituted as plaintiff.

The general facts as shown by the findings are, in substance, as follows: The defendant, during the months of June and July, 1914, by due legal proceedings, authorized and caused to be graded, filled, and improved Keller Street between Oak and West Streets, in the said city of Petaluma. The plaintiff was the owner of certain premises which abut upon the street so graded and improved, said premises having a frontage on

said Keller Street of 184 feet, said frontage beginning at the point of intersection of the southerly line of Kent Street with the westerly line of said Keller Street. The plaintiff's said lands extend through the entire block to Liberty Street, and slope downward in a southerly direction from Kent Street in such manner as to cause a small ditch or gully over and upon plaintiff's said lands, and into which, "for time immemorial," the flood waters and drainage of plaintiff's land flowed in an easterly direction from the said lands and over and across said Keller Street. Said ditch or gully formed a natural watercourse over and across Keller Street and by it, for many years prior to the improvement of Keller Street as above stated, the plaintiff's lands were thoroughly drained. These lands were suitable for and adapted to agricultural purposes, and, for many years prior to the improvement mentioned and down to the winter of 1914, the plaintiff had cultivated, raised, and harvested on said lands crops of green vegetables and potatoes and had maintained thereon a full-bearing orchard, consisting of pear, apple, and prune trees, and harvested crops of fruit therefrom.

In the grading, filling, and improvement of said Keller Street, the defendant, or the contractor to whom the contract for performing said work of improvement was awarded, filled up, dammed, and thus obstructed the lower end of said "ditch, gully, and natural watercourse," and raised the said dam to the height of twenty-one feet, "which said fill extended across the entire lower and easterly side of plaintiff's lands and premises and abutted thereon. That the plans and specifications adopted by said defendant for the doing of said street improvement work on Keller Street make no provision for any bulkhead or retaining wall to hold or retain the said fill, and to prevent the same from caving in or sliding on to the lands of adjoining private property owners, and accordingly it was impossible to do the said work without extending the said fill, at the base thereof, at least twenty-five or thirty feet on to the lands of private property abutting upon said Keller Street, on either side thereof, including the said lands of plaintiff. That the contract for doing said work, which was duly accepted and let by said defendant, provided for a culvert seventy feet in length. That a culvert of such length was obviously unfit and insufficient for any purpose whatever, for the reason that in doing said work according to the

plans and specifications it was necessary to encroach upon the property of abutting private owners at least twenty-five feet at the base of the fill on either side of the street, in order that the surface of said street twenty feet above the lowest point of the fill could be held in place. Hence it was apparent at the time of the doing of said work and of the adoption of the said plans and specifications and the letting of the contract for the doing of said work, that a culvert or drain at least 120 feet in length was necessary in order that it might extend through the toe of the fill and thus permit the intake of water from the said ditch or gully on plaintiff's lands, and the exit on the other side of the street opposite to plaintiff."

The defendant failed to provide or construct a culvert, conduit, or other adequate means for carrying away the flood waters and drainage from plaintiff's lands and premises as the same had theretofore been carried away for many years by means of the said natural watercourse. The result of the fill and the obstruction so caused by the defendant and its failure or omission to provide a sufficient or adequate culvert or conduit whereby the surface waters could be carried away was to flood and inundate the lands and premises of plaintiff to the depth of approximately ten feet during the winters of the years 1914 and 1915, thereby causing to form on said premises a lake or mud pond, which remained upon said lands during the summers of 1915 and 1916. In the summer months of the years 1915 and 1916 said lake or pond "became filthy and contaminated with slime and scum and disease producing bacteria, and created a stench offensive to the smell and dangerous and injurious to human health." By reason of the unsanitary and unhealthy condition arising from said polluted lake or pond the premises of plaintiff have been greatly deteriorated in value as residence lots, into which the plaintiff intended to divide said premises and so sell the same when he bought said premises long prior to the time at which said Keller Street was graded and improved under the authority and by the direction of defendant; and, because of the flooding of his premises as the result of said grading and improvement of Keller Street and the obstruction of the said natural watercourse as a result thereof, he was compelled to raise his dwelling-house several feet in order to prevent the surface waters accumulating upon his premises from flowing therein; that, by reason of the conditions above described and which

were created by the acts of the defendant in grading and improving Keller Street and in omitting to establish adequate means for carrying off the surface waters from and draining said premises, the plaintiff has been deprived of the use of his said premises for raising and harvesting fruits and vegetables thereon; that his orchard has been destroyed; that the waters standing upon plaintiff's lands and premises as aforesaid, during the summers of 1915 and 1916, became stagnant and contaminated, and said unhealthy condition of said lands "is liable to subject plaintiff to continuing damage, and is dangerous to public health in the neighboring district."

While the plans and specifications adopted by the defendant for the grading and improvement of Keller Street did provide for an eight-inch corrugated iron culvert seventy feet in length at the bottom of the fill, yet, so the court found, "from said plans and specifications it was obvious that a culvert of such length and size was wholly inadequate and would serve no purpose whatever, for the reason that the plans as adopted for such improvement would reasonably have required a bulkhead or retaining wall to prevent said street from caving in or sliding on to the lands of adjoining property owners, or in the absence thereof would reasonably have required a drain-pipe of at least 120 feet in length in order that the intake and outlet thereof would have cleared the toe of the embankment so as to have permitted water to flow through the same."

The defendant demurred to the complaint on both general and special grounds. The special grounds of demurrer involve, among other special objections, an attack upon the complaint for the reason, as set forth in the demurrer, that there are therein several causes of action improperly united and not separately stated. The particular objection on special grounds is that a cause of action for injury to property and a cause of action for personal injury are united in said complaint; and also that a cause of action for damages is improperly united with a cause of action for an injunction.

The demurrer having been overruled, the defendant answered by denials of the material facts stated in the complaint, and by an amendment of the answer set up a special defense by way of an estoppel, it being alleged that the plans and specifications adopted by the defendant for the construction of the work referred to above provided an ample drain for carrying away the surface waters from plaintiff's lands and

for the placing of the said drain in a proper place to accomplish that purpose; that the same was suitable and proper to carry away all of said surface waters, but that the plaintiff requested the contractor and superintendent of streets to change and alter, and upon such request the latter did change and alter, the location of said drain-pipe and place the same at an elevation above the location adopted by said defendant; that plaintiff requested and directed said contractor to dump and deposit the unused dirt and earth caused by the construction of said street on to his land on the west side of Keller Street, and at the request of plaintiff said contractor did dump and deposit a large quantity of dirt and earth thereon, by reason whereof the end of said drain-pipe was filled up.

The court found that the damage suffered by the plaintiff amounted in money to the sum of \$475, of which the sum of one hundred dollars constituted the expense necessarily incurred in raising plaintiff's dwelling-house to a height which would prevent the flowing of the surface or flood waters therein.

Judgment was entered accordingly and also that the defendant be required to place a suitable drain or culvert of such size and length through and over Keller Street as will effectually drain and carry away the surface waters from plaintiff's lands.

The appeal is prosecuted by the defendant from said judgment.

As to the special defense that the plaintiff consented to and directed the change in the location of the drain-pipe and instructed the contractor and superintendent of streets to deposit the unused earth upon his premises, the court found "that the plaintiff did not request or instruct the contractor or superintendent of streets or any other person to change or alter the proposed location of said drain-pipe or to place the same at an elevation above that adopted by said defendant in the plans and specifications; that the said drain-pipe was not located and placed in the position where the same now is, to wit, at a point one foot above the lowest part of plaintiff's premises, at the special instance and request of plaintiff; that plaintiff did not request or direct the said contractor or any other person to dump or deposit the unused earth and dirt caused by the construction of said street on his said lands on the west side of Keller Street."



The first point urged for a reversal grows out of the order overruling the demurrer. The defendant claims that the complaint is clearly amenable to the objection that in it are improperly united a cause of action for injury to property and a cause of action for injury to person. It is further claimed, as seen, that it is obnoxious to the same objection because a cause of action for damages and a cause of action for injunctive relief are united.

Section 427 of the Code of Civil Procedure, as amended by the legislature of 1915 (Stats. 1915, p. 30), provides, among other things, that "Causes of action for injuries to person and injuries to property, growing out of the same tort, may be joined in the same complaint, and it is not required that they be stated separately." It is clear from the averments of the complaint that the two causes of action—one for damages to property and the other for injury to health—grew out of and are the direct result of the same tort; hence the objection to the complaint upon that ground is obviously without force.

Nor was it improper to unite a cause of action for damages with a cause of action for injunctive relief. That a party is entitled to sue for any relief which properly comes within the facts stated in his pleading is an elementary rule in our practice and procedure. The specific relief asked for is in the nature of a mandatory injunction. The complaint clearly enough discloses by its averments that if the condition existing on plaintiff's premises which was created by the manner in which the street was authorized and caused to be improved by the defendant continued, it would result not only in permanent injury to plaintiff's freehold but would operate as a continuing menace to the health of the plaintiff and the people of the neighborhood of the premises affected; and from the averments of the complaint it is clear that the condition in which the defendant left the premises of the plaintiff could be corrected or changed so that neither the property nor the health of plaintiff and others residing in his neighborhood would be injured.

There is nothing said, in *Rooney v. Gray Bros.*, 145 Cal. 753, [79 Pac. 523], which militates against the conclusion thus announced.

The demurrer on special grounds was properly overruled.

It is next contended that the general demurrer should have been sustained for the reason that the complaint does not dis-

close that the grading and the improvement of Keller Street was done by the defendant and that it is responsible for the damage to plaintiff's property. The complaint merely alleges that the defendant *caused* the work to be done. We think that this allegation was sufficient to indicate that the work was done under the direct authority of the defendant. The case of *Krause v. Sacramento*, 48 Cal. 221, cited by the appellant, does not support the view that the complaint in this case should fall because it fails directly to state that the work was done by the direct authority of the defendant, although such a statement, it must be admitted, would have improved that pleading. At the time of the decision of the *Krause* case (see, also, *O'Hale v. Sacramento*, 48 Cal. 212), the charter of the city of Sacramento provided that the work of improving streets and constructing sewers should be done by contract, except in certain cases as to the first-mentioned character of street improvement where the street commissioner might have required the work to be done by the owners of abutting lots. Under the present general state laws authorizing the improvement of streets in municipalities, under which the improvement herein involved was admittedly done, power is expressly conferred upon the governing or legislative boards or bodies of municipalities to order such work to be done according to plans and specifications prepared under their direction and adopted by them. Therefore, in considering the complaint here, we must view it by the light of the power vested by law in the defendant as a municipal corporation to authorize such work to be done according to plans adopted by it, and thus viewing the complaint the averment that the defendant caused the work complained of herein to be done plainly means that the work was done by its direction and according to plans and specifications adopted by it for that purpose.

It is further insisted, however, that under no view of the evidence can the defendant be held liable for the damages claimed by the plaintiff in the complaint. But, in so far as this proposition involves the question of the sufficiency of the evidence to support the findings, there is no proper record for the review thereof. The form of the record here is not a statement on appeal, for, as we will show, there is now no statement on appeal. Nor is it a bill of exceptions, because it is wanting in one of the essential requisites of a bill of exceptions, viz., a specification of the particulars wherein it

is claimed that the evidence is insufficient to justify the decision. (Code Civ. Proc., sec. 648; *Coveny v. Hale*, 49 Cal. 552; *Watson v. San Francisco H. B. R. Co.*, 50 Cal. 523; *Bonner v. Quackenbush*, 51 Cal. 180; *Elitzroth v. Ryan*, 89 Cal. 135, 140, [26 Pac. 647]; *Winterburn v. Chambers*, 91 Cal. 170, 185, [27 Pac. 658]; *Commercial Bank v. Redfield*, 122 Cal. 405, [55 Pac. 160, 772]; *Estate of Behrens*, 130 Cal. 416, 418, [62 Pac. 603].)

This action was instituted in the month of July, 1916. The legislature of 1915 so amended the procedure as to the preparation of records on appeal that, at the present time and at the time this action was commenced, there is and was no provision in our law for a "statement on appeal." (See Stats. 1915, pp. 201-207, inclusive.) The result is that, since the changes made by the legislature of 1915 above referred to, there are two methods only whereby the evidence may be brought up for consideration and review, on appeal, to wit: 1. By a bill of exceptions, as provided by sections 648 and 650 of the Code of Civil Procedure; 2. Under what is commonly known as the alternative method, as provided by section 953a of said code.

It is obvious that the record here was not prepared in pursuance of the provisions of section 953a. Indeed, it is not pretended that the record was prepared under said section, but, to the contrary, counsel designate it as a "statement on appeal after a denial of motion for a new trial, made on the minutes of the court." But, as shown, there is no such a record on appeal now, and the record here was evidently intended as a bill of exceptions and is, in legal effect, if anything at all, a purported bill of exceptions; but, as stated, is fatally deficient as such in that the particulars in which it is claimed that the evidence does not support the findings are not specified as required by the code section above named.

Nor is appellant aided in the matter by its notice of intention to move for a new trial, since therein it has also failed specifically to point out the particulars in which it claims the evidence is insufficient to justify the decision. And a general specification is insufficient where there is more than one finding. (See cases above cited and also *Matter of Baker*, 153 Cal. 537, 541, [96 Pac. 12]; *Hauley v. Harrington*, 152 Cal. 188, [92 Pac. 177]; *Meek v. Southern Cali-*

*fornia Ry. Co.*, 7 Cal. App. 606, [95 Pac. 166]; *Dawson v. Schloss*, 93 Cal. 194, [29 Pac. 31]; *De Molera v. Martin*, 120 Cal. 544, 546, [52 Pac. 825].)

It follows that it must be assumed by this court that all the findings of fact have been correctly found or were based on sufficient evidence. (*Winterburn v. Chambers*, 91 Cal. 170, 185, [27 Pac. 658].)

But the point made by the appellant that the defendant is not, under the facts, liable for the damage sustained by the plaintiff may be considered by reference to the facts as found by the court and certain admissions by the defendant.

The contention is that the case here falls within the rule enunciated and applied in the case of *Sievers v. San Francisco*, 115 Cal. 648, [56 Am. St. Rep. 153, 47 Pac. 687]. In that case a contract had been let, after due legal proceedings by the authorities, to grade Van Ness Avenue, in the city of San Francisco, to the "official grade," which was seventy-five feet above base. A futile attempt had been made by the supervisors to change the grade to eighty-three feet above base. The city engineer and surveyor, whose duty it was to furnish grade lines and levels (Stats. 1891, p. 206), assumed eighty-three feet to be the official grade, and the contractor filled in accordingly. The result of going beyond the true grade was to dam a well-defined channel through which surface water had always flowed and back the water upon the land of plaintiff, doing the damage complained of. It was conceded that no such consequence would have followed the grading of the street to the official grade of seventy-five feet above base. Action against the city of San Francisco was brought by plaintiff for the damage thus occasioned to his premises, the complaint averring that the city wrongfully caused and procured the crossing to be filled with soil, sand, and rock to a height of eighty-three feet above base. A nonsuit was granted by the trial court upon the showing thus made and an appeal from the judgment of nonsuit was rejected by the supreme court. The court in that case said:

"It does not appear that the supervisors, in any of their proceedings, called for any grading except 'to the official grade and line.' The bids were received under this call, and the contract ran in the same language. Precisely as in *Warren v. Riddell*, 106 Cal. 352, [39 Pac. 781], the con-

tractors, through error induced by the city surveyor, or superintendent of streets, or by both, graded six or eight feet above the line called for by the contract. The extra six or eight feet of filling, which alone it is admitted caused the injury, were not placed under any contract with, or directions from, the city. The case, then, differs radically from the many cited and relied upon by appellant, where the injury has resulted from work done for, and as directed by, the municipal authorities. Thus, in *Reardon v. San Francisco*, 66 Cal. 492, [56 Am. Rep. 109, 6 Pac. 317], the injury resulted from street filling done exactly in accordance with the contract. In *Conniff v. San Francisco*, 67 Cal. 45, [7 Pac. 41], Montgomery Avenue was graded as the city directed. But the work dammed a natural watercourse, and the city was held responsible for the resulting injury to property. In *Spangler v. San Francisco*, 84 Cal. 12, [18 Am. St. Rep. 158, 23 Pac. 1091], the city had diverted the waters flowing in a natural waterway into a sewer, and had negligently permitted the sewer to fall into a defective condition, whereby the escaping waters caused damage, for which the city was held liable. In *Eachus v. Los Angeles Ry. Co.*, 103 Cal. 614, [42 Am. St. Rep. 149, 37 Pac. 750], the grading was properly done to the official grade, but, for resulting damages, defendant was held responsible. In *Tyler v. Tehama County*, 109 Cal. 618, [42 Pac. 240], a bridge was built as and where the supervisors directed. But it was constructed upon private property, for the injury to which the owner received compensation.

"In all of these cases, the act or omission had the sanction, express or implied, of the municipal authorities. In the case at bar, the injury resulted from the act of the contractor, neither contemplated nor called for by the supervisors."

In this case the findings disclose, as above shown, that the work of improvement was done strictly in accordance with plans and specifications adopted by the defendant for the work, but that said plans and specifications did not provide for adequate means for taking care of the surface waters accumulating on plaintiff's lands. Moreover, counsel for defendant, at the trial, stipulated that the work was done by the contractor according to said plans and specifications, and in their brief on file herein practically admitted such to be

the fact in the following language: "The work done on Keller Street which resulted in the damming up of the so-called watercourse on the Weisschand property was a work of public improvement done under the general laws of the state of California. All of the proceedings leading up to the work were legal and regular in character. The contract was let and the work was to be done in accordance with plans and specifications adopted by the council of the city of Petaluma."

It is nowhere made to appear that the improvement was not done in accordance with the plans and specifications adopted by the defendant therefor. Herein, therefore, lies the distinction between the Sievers case, relied upon by the appellant, and the present case. The facts of the case here, in other words, bring it within the doctrine announced in *Reardon v. City of San Francisco*, 66 Cal. 492, [56 Am. Rep. 109, 6 Pac. 317], *Conniff v. San Francisco*, 67 Cal. 45, [7 Pac. 41], *Spangler v. San Francisco*, 84 Cal. 12, [18 Am. St. Rep. 158, 23 Pac. 1091], *Eachus v. Los Angeles Ry. Co.*, 103 Cal. 614, [42 Am. St. Rep. 149, 37 Pac. 750], and *Tyler v. Tehama County*, 109 Cal. 618, [42 Pac. 240], all cited in *Sievers v. San Francisco*, 115 Cal. 648, [56 Am. St. Rep. 153, 47 Pac. 687], and therein differentiated from the Sievers case upon precisely the same reason that the latter case is to be differentiated from this.

In *Perkins v. Blauth*, 163 Cal. 782, 789, [127 Pac. 50, 53], the court said: "Upon the other hand, if the act is one commanded by the municipality itself, if inherently wrong, the municipality and the agent who performed will both be liable." Again, in that case, the court, at the same page, says: "One important principle, however, is to be noted in this connection. Wherever the injury complained of is the taking or *damaging* of private property for public use without compensation, then under the guaranty of the federal constitution against such invasion of the private rights of property, neither the state itself nor any of its agencies or mandatories may claim exemption from liability. (Amendment Const. U. S., art. V; *Hopkins v. Clemson College*, 221 U. S. 636, [35 L. R. A. (N. S.) 243, 55 L. Ed. 890, 31 Sup. Ct. Rep. 654].)"

And it might therein have been added, as we here suggest, that such invasion of the private rights of property is

also violative of section 14 of article I of our own state constitution, upon which the right of a person to be compensated in damages for injury to his freehold resulting from the act of a municipality in making a public improvement was sustained in *Reardon v. City of San Francisco, supra*, and in the other cases above named.

The point as to an estoppel is covered by what is said above, that "all findings of fact against which the bill of exceptions contains no specification of their being unsupported by the evidence," we are authorized to presume derive sufficient support from the evidence.

The same reply is to be returned to the contention that the amount of damages awarded by the jury is excessive.

The points last made are as to rulings of the court admitting certain evidence. These rulings we have examined and have not found them subject to the objections urged against them.

The judgment is affirmed.

Chipman, P. J., and Burnett, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on June 17, 1918, and the following opinion then rendered thereon:

**THE COURT.**—Petitioning for a rehearing of this cause, counsel for the appellant insist that we were mistaken in the statement contained in the former opinion filed herein that "the court found that the damage suffered by the plaintiff amounted in money to the sum of \$475, of which the sum of one hundred dollars constituted the expense necessarily incurred in the raising of plaintiff's dwelling-house to a height which would prevent the flowing of the surface or flood waters thereon."

It is argued that the reference by the trial court in its findings to the raising of the house, at a cost of one hundred dollars, "is not a finding as to damage, for the reason that the property may have been worth more after the house was raised at this expense than it was even before the alleged flooding." It is further contended that the alleged finding in the conclusions of law that "plaintiff had been damaged in the sum of \$475 is purely a conclusion of law which must

be drawn, if drawn at all, from a reading of the findings of fact and conclusions of law in their entirety."

As to the first proposition, a ready reply thereto is that it can make no difference what the effect of raising the dwelling-house upon its value was, if, as the court found, the raising of the house and the expense necessarily incident thereto were absolutely required to prevent the overflow water from entering the dwelling. If a man purposely or negligently sets fire to another's house, and it is wholly or only in part destroyed, it would obviously be no answer to a claim against the wrongdoer for damages for causing the injury so inflicted to say or show that, in rebuilding the house or patching up the portions burned, the owner had thereby become the possessor of a better house than he had before the fire.

With respect to the second proposition, it is to be observed that, while the specific finding of the total damage suffered by the plaintiff is among the "conclusions of law," the finding may nevertheless be treated as a finding of fact as well as a conclusion of law. Counsel in their petition concede that "a finding of fact, even though improperly included in what is generally denominated 'conclusions of law,' will be held to be, nevertheless, a finding of fact, if it is in fact clearly and unequivocally made." But it is contended that the finding is equivocal, and it is argued that "where it is equivocal, and may be either a finding of fact or a conclusion of law, the appellate court will not take it out of the place where it was put by the trial court, but will give it the same effect as the trial court gave it," citing *Figg v. Mayo*, 39 Cal. 265, where it is said: "In such cases, where the facts are so obscurely found or are so blended with legal conclusions as to render it doubtful whether the facts are only hypothetically stated, we must disregard it as a finding of fact."

There is nothing equivocal or obscure in the finding in question. Particularly is this true when viewing it in connection with the specific finding that the trees, orchard, vegetables, etc., were damaged by the acts of the appellant, in addition to the damage of one hundred dollars suffered by reason of being compelled to raise the dwelling, as above indicated. It involves an unobscure, unequivocal statement that, for all the damage specifically found to have been in-



flicted upon his property, the plaintiff had suffered in the aggregate damages in the sum of \$475. This sum is far below that claimed in the complaint, and, so far as we may determine from the findings, the amount found as damages is not excessive. But, to support the judgment, we do not think it absolutely necessary that the findings should contain a segregation of the several items of damage alleged in the complaint, in the absence of a request for such segregation. (*Foley v. Martin*, 142 Cal. 260, 261, [100 Am. St. Rep. 123, 71 Pac. 165, 75 Pac. 842].)

Of course, our conclusion here is not to be accepted as an unqualified approval of findings of the character of those in the present case, where, as here, there are presented by the pleadings several different issues upon the matter of the damage complained of. Still, we cannot persuade ourselves that, conceding, for the sake of the argument, that the findings should have been more specific as to the damages suffered by the plaintiff, the appellant has been prejudiced thereby, since the findings clearly show that the plaintiff's property was seriously damaged by the acts of appellant and since, furthermore, the damages awarded are far below those claimed. (Code Civ. Proc., sec. 475.)

We are satisfied with the conclusion announced in our former opinion in other respects.

The petition is denied.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 15, 1918.

---

[Civ. No. 2308. First Appellate District.—May 20, 1918.]

VICTOR O. BURDELL et al., Appellants, v. ST. LUKE'S HOSPITAL (a Corporation), Respondent.

**NEGLECT—INJURY TO HOSPITAL PATIENT—CARELESSNESS OF NURSES  
—EVIDENCE—DIRECTED VERDICT FOR DEFENDANT.**—In an action against a hospital corporation for injuries sustained by a pay patient through the negligence of nurses employed by the corporation the court correctly directed a verdict for defendant where it was shown

that the hospital was not formed for pecuniary profit, that no profit was in fact made, and no evidence was offered to show that defendant was negligent in employing incompetent nurses.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. George A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

Samuel T. Bush, for Appellants.

Chas. S. Wheeler, for Respondent.

ZOOK, J., *pro tem.*—In this action for personal injuries alleged to have been sustained by plaintiff Helen E. Burdell through the negligence of defendant's servants, the court directed a judgment for defendant, from which plaintiffs appeal.

The evidence showed that plaintiff, Mrs. Burdell, entered defendant's hospital as a paying patient and was charged the regular rates of the hospital for the services rendered to her. The injuries complained of were alleged to have been sustained through the negligence of nurses employed by the hospital, but no evidence was offered to show that defendant was negligent in employing incompetent or careless nurses or in omitting to use due care in the selection of its staff. The articles of incorporation of defendant stated that the purpose for which it was formed was the founding and maintenance of a hospital in San Francisco for the relief and care of such sick persons as might desire its benefits, and that its object was not pecuniary profit. It also appeared from the evidence that the hospital buildings were the gift of charitable persons to the corporation; that poor and needy persons, without distinction of race or creed, were admitted to the hospital and treated without charge, the percentage thereof varying from seven to fifteen per cent of the total number of patients; that although the other patients paid fees for the services rendered them, no profit was made, or attempted to be made, from that source; that in the four years preceding the trial the expenses of operating the hospital exceeded the amount taken in as fees by more than eighteen thousand dollars, a large part, but not all, of which

was the money lost by taking in poor patients; that the trustees charged with the conduct of the affairs of the hospital served without pay, and that the only persons receiving any compensation were the hospital staff, consisting of the superintendent, nurses, and attendants.

Upon this showing the lower court was clearly correct in directing a verdict for defendant, under the rule laid down in *Thomas v. German Gen. etc. Soc.*, 168 Cal. 183, [141 Pac. 1186], where it is said that "where one accepts the benefit of a public or of a private charity he exempts by implied contract the benefactor from liability for the negligence of the servants in administering the charity, if the benefactor has used due care in the selection of those servants." The fact that plaintiff paid the regular rates charged by the hospital for paying patients does not take the case out of the operation of this rule, for it is apparent that the rates were not charged with a view of making a profit from her, and the moneys received from paying patients were not in fact sufficient to meet even the ordinary operating expenses of the hospital, without considering any interest upon the amount invested in the buildings. It is clear, therefore, that plaintiff was to some extent the beneficiary of the charity for which defendant corporation was organized, and comes within the rule quoted.

Judgment affirmed.

Beasley, J., *pro tem.*, and Kerrigan, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on June 18, 1918, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 18, 1918.

[Civ. No. 1751. Third Appellate District.—May 20, 1918.]

CHARLES HING, etc., Respondent, v. JOE LEE et al.,  
Defendants; FIRST NATIONAL BANK OF MERCED  
(a Corporation), Appellant.

**EXECUTION—LIFE INSURANCE—EXEMPTION.**—All moneys, benefits, privileges, or immunities accruing or in any manner growing out of any life insurance, if the annual premiums paid do not exceed five hundred dollars, are exempt from execution.

**BANKING LAW — DEPOSITS FOR COLLECTION — TRUST.**—The deposit of mortgages and other specific instruments for collection or the drawing of a draft on a debtor and giving it with specific instructions to collect and remit is a trust transaction, and the money, if collected, is affected with the trust.

**ID.—CHANCE FROM TRUST TO DEBTOR RELATION.**—While the trust relation might be changed by custom or agreement into that of debtor and creditor after the collection of the proceeds, the bank cannot divest itself of the trust relation and assume the other at its own convenience.

**ID.—COLLECTION OF INSURANCE POLICY—PAYMENT TO SHERIFF ON GARNISHMENT PROCEEDINGS AGAINST INSURER — BREACH OF TRUST.**—Where a bank collects an insurance policy and is instructed by the insurer to pay the claim of the bank and hold the balance for the insurer until called for, the balance constitutes a trust fund, and it is a clear violation of such trust for the bank to pay over the same to the sheriff on garnishment proceedings without giving the insured any notice in order that he might make a claim of exemption.

**APPEAL** from a judgment of the Superior Court of Merced County. E. N. Rector, Judge.

The facts are stated in the opinion of the court.

Terry W. Ward, for Appellant.

John Outcalt, for Respondent.

**BURNETT, J.**—On the 1st of April, 1901, the Equitable Life Assurance Society of the United States issued to respondent an endowment policy of life insurance. Thereafter respondent borrowed from said society the sum of one thousand dollars and assigned to appellant the said policy as

security for the payment of said indebtedness, the bank undoubtedly acting as agent of the insurer in the matter.

The policy matured on the 1st of April, 1916, and there became due plaintiff the sum of \$1,325.94, being the face value of the policy and the surplus reduced by said one thousand dollar loan. The insurer sent to appellant a check for said amount payable to said bank and to plaintiff, which was received by appellant on the fourth day of April, 1916. At this time respondent was indebted to appellant in the sum of \$431.45, on certain promissory notes, and, also, to one J. H. Simonson upon a promissory note for the sum of \$436, which note was held by the bank, as security for the payment of a loan by it to said Simonson. The annual premium on said policy was less than five hundred dollars, and, therefore, "all moneys, benefits, privileges, or immunities accruing or in any manner growing out of" said policy were exempt from execution. (Code Civ. Proc., sec. 690, subd. 18; *Briggs v. McCullough*, 36 Cal. 542; *Holmes v. Marshall*, 145 Cal. 780, [104 Am. St. Rep. 86, 2 Ann. Cas. 88, 60 L. R. A. 67, 79 Pac. 534].)

On receipt of said check the cashier of the bank sent a clerk with the check to plaintiff's home, a few blocks distant, with a request that plaintiff sign it, which he did. It was understood and agreed between plaintiff and the bank that out of the proceeds of the policy the said indebtedness of respondent to appellant and to said Simonson should be paid. Plaintiff was credited with these payments on the fifth day of April, and the balance of said check for \$1,325.94, or the sum of \$458.49, was deposited in said bank by the cashier to the credit of plaintiff. The next day the sheriff of the county, under and by virtue of an execution issued out of the superior court of said county upon a judgment recovered in said county by one Joe Lee against said plaintiff and others, previous to the sixth day of April, 1916, for a sum in excess of \$458.49, levied upon the money of plaintiff in the hands of said bank, and the said bank, through its president and cashier, delivered to said sheriff upon said execution the said sum of \$458.49. Plaintiff knew nothing of the levy until some days after the money had been paid over to the sheriff, and, therefore, had no opportunity to claim any exemption from execution. He afterward made a demand upon the bank for the payment of said amount but it was denied.

The court held that the proceeds of the insurance policy constituted a trust fund in the custody of said bank and that appellant was not legally justified in paying it over to the sheriff, without affording the plaintiff an opportunity to make his claim of exemption. The finding as to the trust relation is supported by the testimony of plaintiff. His testimony was given in somewhat broken English, but, after stating that Mr. Hart, the cashier of the bank, called him up by telephone, he proceeded: "He told me, 'You know the money came all right'; he told me to sign the name on the check. I say, 'You leave the money in there and I go up where I get well with my foot, when I go up there. I will pay Mr. Simonson and the balance I leave in the bank to pay the Chinaman. I owe the Chinaman two or three hundred dollars. I borrow money to pay on that life insurance two or three years ago from two Chinamen; he go home now. I no tell Mr. Hart to deposit the money.' I said, 'The balance you leave. I want to take that money and pay the Chinamen.' "

There can be no doubt that the check was the property of plaintiff, and that he directed the said officer of the bank to cash it, pay the claim of the bank and of Simonson, and hold the balance until plaintiff could call for it. The situation is covered by the principle announced in section 313, page 634, 7 C. J., as follows: "The deposit of mortgages and other specific instruments for collection or the drawing of a draft on a debtor and giving it with specific instructions to collect and remit is a trust transaction and the money, if collected, is affected with the trust."

As to this point several instructive cases are cited by respondent, one of which is *Hall v. Beymer*, 22 Colo. App. 271, [125 Pac. 561]. Therein Beymer placed with Rocky Ford Bank a note for collection. The bank sent the note to a Colorado Springs bank, which collected it and remitted the proceeds in the form of a draft. This was received by the Rocky Ford Bank on December 28th, which, on the same day, sent it to a Pueblo bank to the credit of the former. On December 31st the Rocky Ford Bank placed the amount of the collection to Beymer's credit on its books and the same day said bank ceased to do business. The testimony showed that Beymer was asked by the president of said bank if he "wanted to put the proceeds in as a deposit" and he

replied, "No, I wanted it for myself. I wanted the collection." The court held that the Rocky Ford Bank was Beymer's bailee not his debtor.

The facts of that case present a similar situation to the one herein involved. There seems to be no essential difference. It is true, as the authorities hold, that, in such cases, "the trust relation might be changed by custom or agreement into that of debtor and creditor after the collection of the proceeds," but it is equally true that "a bank cannot divest itself of the trust relation and assume the other at its own convenience." (7 C. J. 634.)

Of course, it is the duty of the trustee to protect and preserve such property for the benefit of the beneficiary. (39 Cyc. 325.) It was a clear violation of this primary obligation for the trustee to pay over the property to the sheriff without making any effort to preserve it for plaintiff. The bank sustained to respondent a relation of trust and confidence, and it had no right to withhold from the latter information that was essential to the protection of plaintiff's interests. Indeed, rather than permit the property to be lost to plaintiff without an opportunity to assert his claim of exemption, the bank should have informed the sheriff that the money was exempt from execution and would not be paid over until it could be ascertained whether plaintiff desired to waive his privilege. It is manifest, also, that the bank could have lost nothing by pursuing this course. Within a few minutes plaintiff could have been notified, and, unless he claimed his privilege immediately, he would have been justly deemed to have waived it. The bank was apparently more anxious to have the judgment creditor satisfied than to exercise the utmost good faith toward plaintiff. Debts should be paid, but public policy recognizes the exemption of certain property belonging to debtors as even more important than the payment of his debts. Otherwise it would not be protected by the law from execution. But of what avail to the debtor is the privilege, if he have no opportunity of exercising it? He is not required to claim the privilege until an occasion arises whereby the property is liable to be taken away from him. Here he had no such opportunity in consequence of appellant's violation of its duty to notify him of the occasion for the exercise of his privilege. We consider it a plain case of breach of trust on the part of appel-

lant, and we cannot believe that the moral sense of the community or the common practice of banks or any provision of the statute justifies the course, which was herein pursued to the prejudice of respondent.

We think that the case is governed by the fundamental principle of good faith which characterizes the status of a trustee, but, even if we concede that, by virtue of the deposit of the money, the bank became merely the creditor of plaintiff, the debt was exempt from execution. The reason for this view is clearly set forth in the Holmes case, *supra*. Therein it is said: "Appellant contends that by depositing the money in the bank the money lost its identity and that thereafter the bank owed Annie J. Jenkins the money. That the debtor thus voluntarily parted with the money, which was exempt, and acquired in lieu thereof a credit due by the bank. Said construction would seem to be unreasonable and no authority is cited which supports it." The court proceeds to a more detailed consideration of the subject and reaches the conclusion that appellant's contention involves an absurdity which must be rejected.

Considering it thus a deposit, we feel satisfied that, in view of the ignorance of plaintiff of the levy of the execution, it was the duty of the bank to notify him before paying over the money to the sheriff. If it had been other personal property belonging to plaintiff, in the possession of defendant, a sale would be required, and it would have made no particular difference whether the bank gave notice or not, since the sheriff would have been required to give notice to plaintiff before the sale. But, it being money, the conduct of the bank made it impossible for plaintiff to claim this privilege of exemption, and hence appellant should be held responsible for the amount lost.

In Freeman on Executions, third edition, section 416, it is said: "Although as a general rule the exemption of property from execution can only be claimed by its owners, yet the rule does not apply to proceedings by garnishment. If the garnishee has in his possession any property or credit of the defendant not subject to execution he certainly may and he probably must, assert the fact of such exemption and thereby prevent the property from being taken and applied under the execution. . . . When, however, the person summoned knows of a defense as that the debt or property sought to be reached



is exempt from execution, we believe that it is his duty to assert such defense, or, at least, to inform his creditor of the proceeding and give him an opportunity to act for himself, and if the duty is not performed, that no judgment or order against the person summoned can protect him from liability to his creditor."

In the case at bar the garnishee knew, or, at least, had reason to know, that the property was exempt from execution and that the judgment debtor had no knowledge of the garnishment, and hence the payment of money to the sheriff does not protect appellant from liability to the judgment debtor.

We agree with respondent in the statement of these propositions: "1. Respondent was the owner of the policy in question and of that part of the proceeds thereof here in controversy at the time of the receipt of the same by the bank on April 4, 1916, and continuously up to and including the time of the levy. 2. The proceeds of said policy were exempt from execution under subdivision 18 of section 690 of the Code of Civil Procedure. 3. It was not the respondent's duty to claim exemption before the levy, or to make such claim upon anybody other than the levying officer or to make such claim after it would have been an idle and ineffective act. 4. Appellant bank was a trustee of the proceeds of said policy for respondent's benefit. 5. The bank could not make respondent its depositor without his consent. 6. Though exemption is a personal privilege, which the judgment debtor may waive if he choose, yet the privilege exists until he, himself, or someone authorized to do so for him waived it either in express words or by overt act, or by waiting more than a reasonable time before attempting to claim it, and a garnishee, whether trustee or mere debtor, cannot waive it for him, or deprive him of the opportunity to claim it without being liable to him in damages. (18 Cyc. 1449; Smyth on Homestead and Exemptions, sec. 562; *Southern Ry. Co. v. Fulford*, 125 Ga. 103, [5 Ann. Cas. 168, 54 S. E. 68] )"

In some of the cases cited in support of the lower court's decision, the garnishment proceedings involved a formal suit in court, but, manifestly, the same principle must apply with greater emphasis to our summary proceeding of garnishment, wherein more easily may a judgment debtor be deprived of his statutory privilege of exemption.

Another point, upon which appellant lays some stress, relates to the proof of the demand claimed to have been made upon appellant for the payment to respondent of said sum of money. The allegation of the complaint, however, as to that was not denied in the answer, and, of course, it is deemed admitted. We need not, therefore, consider the sufficiency of the proof.

Some other questions are argued by appellant, but we think the foregoing covers the material considerations in the case.

We are satisfied that the decision of the lower court is just and the judgment is therefore affirmed.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 18, 1918.

---

[Civ. No. 2166. Second Appellate District.—May 20, 1918.]

LESLIE B. RIGGINS, Respondent, v. CHARLES C. PATTERSON et al., Appellants.

**BROKERS' COMMISSIONS—EXCHANGE OF PROPERTY—COMPENSATION FROM BOTH PARTIES—RULE.**—An agent in acting in the matter of the sale or exchange of property may not collect compensation from both parties unless each party had full knowledge of the facts concerning the agreement of the other to pay compensation.

**ID.—ACTION FOR COMMISSIONS—DOUBLE AGENCY—LACK OF KNOWLEDGE OF PARTIES—JUDGMENT WITHOUT SUPPORT.**—In an action by an agent for a commission in procuring an agreement for an exchange of real properties, where it was found that plaintiff was acting as agent for both parties, and there was no finding that both parties knew of the double agency, the judgment in favor of the plaintiff is not sufficiently supported.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. L. T. Price, Judge Presiding.

The facts are stated in the opinion of the court.

Robert H. Scott, and Hutton & Williams, for Appellants.

Thos. C. Ridgway, for Respondent.

JAMES, J.—This appeal is taken from a judgment entered in favor of the plaintiff for the sum of five hundred dollars. It is presented on the judgment-roll alone. For cause of action plaintiff alleged in its complaint that on August 11, 1914, the defendant agreed in writing to pay the plaintiff the sum sued for as commission for services theretofore rendered by Leslie B. Riggins Company, a corporation, as real estate agent in procuring an agreement of exchange of properties of defendant Patterson for property belonging to one Denton and one Beggs. The answer made by the defendant first contained a denial of all the material allegations of fact embraced within the complaint. It was then set up as a further defense that the plaintiff, on the eighth day of August, 1914, was employed by Denton and Beggs to act as their agent and broker in procuring the alleged agreement for the exchange of real estate and that Denton and Beggs agreed to pay the plaintiff as compensation for such services the sum of six hundred dollars; that on about the same date the plaintiff accepted the employment and did at all times subsequent thereto represent and act for said Denton and Beggs as their agent and broker, and while representing itself to be such agent procured from the defendant Frank Reeves an acceptance of said proposition to exchange the real property. As a third defense defendant alleged that if any services had been rendered by the plaintiff, the same were voluntarily rendered and without any employment or authority or request from the defendant. The court made findings of fact determining, first, that prior to August 11, 1914, the plaintiff, as real estate agent, rendered services to the defendant in procuring an agreement of exchange of property belonging to the defendant Patterson for property belonging to Denton and Beggs; that defendant agreed on August 11, 1914, in writing, to pay the sum of five hundred dollars as commission for such services. There is a finding also that no part of the sum sued for had been paid. The court then further finds that on the eighth day of August, 1914, Denton and Beggs entered into an agreement with the plaintiff by which they employed the plaintiff as their agent in procuring the agreement of

exchange and agreed to pay such agent the sum of six hundred dollars for such services. This finding follows: "It is true that plaintiff's assignor accepted said employment and at all time subsequent to the eighth day of August, 1914, represented and acted for said Alice M. Denton and Hugh H. Beggs as their agent in procuring said agreement of exchange, and said plaintiff's assignor did on August 8, 1914, while representing itself to be the agent of said Denton and Beggs, procure from defendant, Frank Reeves, an acceptance of said agreement of exchange, and the court further finds that said acceptance was in writing indorsed upon and forming a part of said agreement of exchange signed by said Denton and Beggs, and that in said acceptance said defendant Reeves agreed to pay plaintiff's assignor the sum of five hundred dollars commission for services rendered." The further finding made recites the depositing of deeds in escrow by the several parties to the transaction. It is contended on behalf of appellant that the findings do not support the judgment in that it is not determined by the court that at the time the agreement to pay commission was made both parties to the exchange had knowledge of the fact of the agreement on the part of the other to pay commission to the agent. That the law is that an agent in acting in the matter of the sale or exchange of property may not collect compensation from both parties, unless it appears that each party had full knowledge of the facts concerning the agreement to pay such compensation, is not here in dispute. Respondent's answer to the contention advanced by the appellant is that the lack of knowledge on the part of either party is a matter of affirmative defense to an action brought to recover commission and that such defense is not presented by the pleadings in this case. The second answer urged is, conceding the pleadings were sufficient to present such an issue, in the absence of a finding upon the issue it will be presumed in support of the judgment that if such finding were made, it would be adverse to the appellant. In so far as appellant Reeves is concerned, it does appear at least by inference from the finding that he had knowledge prior to the time of making his agreement to pay commission that Denton and Beggs had already agreed to pay the sum of six hundred dollars to the plaintiff on the same account. This appears from the fact that the court finds,

first, that the agreement of exchange prepared by Denton and Beggs or offered by them contained the agreement on their part to pay commission, and that it was this agreement which was indorsed by Reeves or accepted by him in writing and by which acceptance he bound himself on his part to pay five hundred dollars as commission for the services of the plaintiff. It nowhere appears in the findings that appellant Patterson signed any acceptance of that agreement of exchange or had any knowledge of the agreement to pay commission as made by the other parties to it. The court finds merely, in substance, that Patterson deposited with a title or trust company a deed with instructions, which instructions were in accordance with the terms and agreements of the agreement of exchange. The facts as found by the court do not give to the plaintiff the character of a middleman from which it might be assumed that he was dealing as the agent of both parties with their knowledge, but the court particularly finds that plaintiff was employed as the agent of Denton and Beggs, and that representing himself to be such agent to Reeves, he procured an acceptance of the agreement of exchange. In *Glenn v. Rice*, 174 Cal. 269, [162 Pac. 1020], it is said: "The authorities, with practical unanimity, declare that if an agent is engaged by both parties to effect a sale of property from one to the other, or an exchange between them, not as a mere middleman to bring them together, but actively in inducing each to make the trade, he cannot recover compensation from either party, unless both parties knew of the double agency at the time of the transaction. The reason for the rule is that he thereby puts himself in a position where his duty to one conflicts with his duty to the other, where his own interests tempt him to be unfaithful to both principals, a position which is against sound public policy and good morals. His contract for compensation being thus tainted, the law will not permit him to enforce it against either party. It is no answer to this objection to say that he did, in the particular case, act fairly and honorably to both. The infirmity of his contract does not arise from his actual conduct in the given case, but from the policy of the law, which will not allow a man to gain anything from a relation so conducive to bad faith and double dealing. And the fact that the party whom he sues was aware of the double agency and of the

payment, or agreement to pay, compensation by the other party, and consented thereto, does not entitle him to recover. He must show knowledge of both parties. One party might willingly consent, believing that the advantage would accrue to him, to the detriment of the other. The law will not tolerate such an arrangement, except with the knowledge and consent of both, and will enter into no inquiry to determine whether or not the particular negotiation was fairly conducted by the agent. It leaves him as it finds him, affording him no relief." As the findings of fact in this case disclose that the plaintiff was attempting to act as the agent of both parties to the transaction, and it does not appear that either Patterson or Denton and Beggs knew of the double agency, as between these parties sufficient facts are not found to support the judgment as made. We think that even had the answer contained merely a general denial, when the facts disclose conditions as shown by the findings, the rule of public policy adverted to in the decision in *Glenn v. Rice, supra*, would interpose to prevent relief being granted to the plaintiff. In our opinion, the further finding was necessary to be made in order that the judgment have validity, showing the necessary facts to relieve the case from the rule. We do not think that such a finding can be supplied by inference or presumption.

After complaint filed the cause of action herein was assigned by the Leslie B. Riggins Company to Leslie B. Riggins, and proper substitution made by order of court. For convenience we have referred in the foregoing to the Leslie B. Riggins Company as the plaintiff.

The judgment as against appellant Patterson is reversed; as against appellant Reeves it is affirmed.

Conrey, P. J., and Works, J., *pro tem.*, concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on June 19, 1918, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 18, 1918.

[Crim. No. 590. Second Appellate District.—May 20, 1918.]

THE PEOPLE, Respondent, v. THOMAS BENNETT,  
Appellant.

**CRIMINAL LAW—ASSAULT WITH DEADLY WEAPON—POINTING OF UNLOADED GUN ACCOMPANIED BY THREAT—INSUFFICIENCY TO SUSTAIN CONVICTION.**—In a prosecution for the crime of assault with a deadly weapon, the pointing of an unloaded gun at the prosecuting witness, accompanied by a threat, without any attempt to use it otherwise, is not an assault with a deadly weapon, and cannot sustain a conviction for an assault for want of present ability to commit a violent injury on the person threatened in the manner attempted.

**APPEAL** from a judgment of the Superior Court of Tulare County, and from an order denying a new trial. W. B. Wallace, Judge.

The facts are stated in the opinion of the court.

Earl A. Bagby, for Appellant.

U. S. Webb, Attorney-General, Joseph L. Lewinsohn, Deputy Attorney-General, and Jerry H. Powell, for Respondent.

**JAMES, J.**—The defendant was charged with the crime of assault with a deadly weapon. The jury returned a verdict finding him guilty as charged in the information. He appeals from the judgment and from an order denying a motion for a new trial.

The crime, as described in the information, consisted in the firing of a shotgun at Maggie Scuffi in the county of Tulare in September, 1917. The complainant testified that she resided on a ranch at the time in question and residing with her was a woman called Mrs. Bradley; that on the day of the alleged assault defendant drove up to the gate in front of the ranch house and asked for Mrs. Bradley; that the latter went out to the buggy, and, after some moments had passed, complainant heard Mrs. Bradley say, "My God, Tom, don't"; that she went to the door and saw that the defendant had Mrs. Bradley by the throat, choking her; that the complainant then started to go to the assistance of the woman,

when defendant pointed a shotgun at her face and said, "If you come another step, we will all go together"; that in the meantime Mrs. Bradley had gotten hold of the barrel of the gun and forced it up and that complainant rushed in and also seized the weapon; that the two women begged the defendant to give up the gun, but that he refused, although upon the solicitation of Mrs. Bradley he did take a shell out of the gun; that Mrs. Bradley then turned and walked into the house. Complainant testified further as follows: "Then I said a few words to him about threatening to burn my property and do me harm that way and then he drove out of the yard and started to go toward town, and I went into the house, and after I turned to go into the door he turned back again and drove in front of my place, and just a minute I looked through the door that he had just passed through in front of the door and had the gun pointed at an angle, and I stepped into a room where Mrs. Bradley had fell down crying and he shot the gun through the screen." The testimony of witness Mrs. Bradley was corroborative of that given by the complainant. Defendant testified at the trial, admitting his presence at the Scuffi ranch on the day in question, and also admitting that he discharged a shotgun on that occasion. He stated that he went there for the purpose of persuading Mrs. Bradley to leave the home of Maggie Scuffi, as he did not think it a fit place for her. When asked why he discharged the weapon he stated that he did it to "put the fear of God in the heart of Maggie Scuffi." He denied having aimed the gun at the door, stating that he aimed it upward, but that as the mare hitched to the buggy suddenly started, the muzzle of the gun was pulled down. From this brief statement of the evidence it will at once be perceived that there was no lack of evidence to sustain the verdict as found by the jury; in fact, it would be difficult to reconcile any other verdict than that returned with the evidence adduced.

In support of his appeal defendant relies mainly upon alleged errors of the trial judge committed in the giving and refusing of instructions. The court, we think, sufficiently advised the jury as to the law to be taken into consideration in arriving at a verdict. The defendant in several paragraphs points out specific objections made to the instructions as given and to alleged error in refusing certain instructions



offered on the part of the defendant. It is argued in the brief that the jury was not sufficiently apprised of the elements of offense of assault with a deadly weapon; that the jury was not sufficiently apprised that in order to constitute the offense it was necessary for it to find beyond a reasonable doubt that the defendant had the ability to do the bodily injury attempted; that the jury was not sufficiently apprised of the purpose for which evidence of the acts of the defendant prior to the time of the alleged assault was admitted; that the crime of simple assault, included within the charge of assault with a deadly weapon, was not sufficiently defined. Examining the charge as given by the court, we find that the jury was instructed very fully as to the necessity that the proof should show the commission of the offense beyond all reasonable doubt, and that the presumption of innocence attached at every stage of the case and "to every fact essential to a conviction." The crime of simple assault was defined in the language of the code. The jury was told that the charge made by the information included within it the lesser offense of assault. An instruction was also given pertinent to the facts of the occurrence in the yard preceding the time that the defendant drove away and before he fired the shot. That instruction advised the jury that "the pointing of an unloaded gun at the prosecuting witness accompanied by a threat, without any attempt to use it otherwise, is not an assault with a deadly weapon and cannot sustain a conviction for an assault for want of present ability to commit a violent injury on the person threatened in the manner attempted." The fact appeared to be, as testified to by the defendant himself, that at the time he first pointed the gun at Maggie Scuffi it was not loaded, as he had discharged it while on his way to the place when he fired at a rabbit. He testified that he reloaded it as he drove out of the yard before the shot was fired through the screen door. The point that the court did not specifically advise the jury as to the limited purpose for which the evidence of the occurrence was admitted is without force. We think that the acts of the defendant while at the ranch of Maggie Scuffi on the day of the alleged assault were so closely connected as to constitute one transaction; that proof of all of such acts was proper to be made as showing the *res gestae*. By the instruction of the

court the first part of the controversy, whereat the gun was only pointed at Maggie Scuffi, was eliminated from consideration.

It is our opinion that the defendant was rightly convicted on abundant proof, and that he had a fair trial.

The judgment and order are affirmed.

Conrey, P. J., and Works, J., *pro tem.*, concurred.

---

[Civ. No. 2376. First Appellate District.—May 21, 1918.]

ZEILA O. BLAKE, Respondent, v. FRANK CRAIG et al.,  
Appellants.

**ACTION FOR FORECLOSURE OF MORTGAGE—DEFAULT IN PAYMENT OF INTEREST—LENGTH OF TIME—PLEADING—REFERENCE TO FILING MARK—SUFFICIENCY OF COMPLAINT.**—Where in an action for the foreclosure of a mortgage it appears from the allegations of the complaint that if any of the installments of interest falling due under the terms of the note set forth in the complaint should remain unpaid for thirty days, the principal should forthwith become due at the election of the holder of the note, the complaint is not demurrable for omission to aver that the alleged unpaid interest was more than thirty days overdue, where it is alleged that the principal with a certain amount of interest was due and unpaid, and by turning to the filing-mark on the complaint it can be learned that the pleading was in fact filed more than thirty days after the alleged default in the payment of interest.

**ID.—ELECTION TO DECLARE WHOLE AMOUNT DUE—NOTICE—FILING OF COMPLAINT.**—In such an action it is not necessary to allege that the plaintiff had elected to regard the whole amount of the principal as due on the default in payment of interest, since the filing of the complaint was of itself a sufficient notice of such election.

**APPEAL** from a judgment of the Superior Court of Marin County. Edgar T. Zook, Judge.

The facts are stated in the opinion of the court.

W. H. Barrows, for Appellants.

Harry F. Sullivan, for Respondent.

KERRIGAN, J.—This is an appeal from a judgment of foreclosure of a mortgage, and is taken on the judgment-roll alone.

From the allegations of the complaint it appears that if any of the quarterly installments of interest falling due under the terms of the note set forth in the complaint should remain unpaid for thirty days, the principal should forthwith become due at the election of the holder of the note. It also appears from the complaint that a certain installment of interest was not paid when due, but that pleading does not allege that thirty days had elapsed since said interest became due, or that the plaintiff had elected to deem the whole note due and payable, and it is contended by the defendants on this appeal that for these reasons their demurrer to the complaint should have been sustained. The complaint, however, alleges that the principal with a certain amount of interest was due and unpaid; and by turning to the filing-mark on the complaint it is learned that in fact the complaint was filed more than thirty days after the alleged default in the payment of the interest. This fact is also shown by admissions in the defendants' answer.

As to the omission of the plaintiff to aver that she had elected to regard the whole amount of the principal as due on the failure of the defendants to pay the interest within thirty days after a certain installment thereof became due, we think it sufficient to say that the filing of the complaint was of itself a sufficient notice that the plaintiff had availed herself of the option to deem the obligation due.

There is no merit in the defendants' point as to their special defense, nor in the objection to the amount of counsel fee allowed by the court.

The judgment is affirmed.

Beasley, J., *pro tem.*, and Murasky, J., *pro tem.*, concurred.

[Civ. No. 2245. Second Appellate District.—May 22, 1918.]

ROBERT MITCHELL, Appellant, v. F. G. WOOD,  
Respondent.

**CHattel Mortgage—CONVERSION OF MORTGAGED PROPERTY—LIABILITY FOR DEFT.**—One who converts personal property which is subject to a chattel mortgage is liable to the mortgagee for the full amount due under the mortgage.

**ID.—ACTION FOR CONVERSION—PLEADING—SUFFICIENCY OF COMPLAINT.**—In an action for the conversion of a mortgaged automobile, an allegation in the complaint "that said automobile was at said time and ever since has been in the possession of the defendant" is not inconsistent with the mortgagor's right to execute the mortgage, where the complaint also alleges that defendant had no title or claim to the property, since it must be assumed that defendant held the automobile as agent or trustee of the mortgagor.

**ID.—MORTGAGE OF PROPERTY IN POSSESSION OF ANOTHER—RIGHT OF OWNER.**—The owner of personal property may execute a valid mortgage thereon, though the property at the time is in the actual possession of another.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Lewis R. Works, Judge.

The facts are stated in the opinion of the court.

Slosson & Mitchell, for Appellant.

Hyman Schwartz, for Respondent.

**SHAW, J.**—Action for the conversion of mortgaged property. The appeal is from a judgment of dismissal entered upon sustaining defendant's demurrer to the complaint.

It appears from the complaint that on July 1, 1915, one Bertha M. Dailey was the owner of an automobile of the value of \$850, which she mortgaged to the plaintiff to secure payment of her promissory note in the sum of three hundred dollars; that at said time, and ever since, the automobile was and has been in the possession of defendant, who at all times mentioned had no right, title, or interest in the same and was not entitled to its possession; that after default in the payment of the note plaintiff, by a writing sufficient in form and substance, demanded delivery of the possession of

the chattel, which demand was by defendant refused. By the terms of the mortgage, the plaintiff, on default by the debtor, was entitled to possession of the mortgaged property.

One who converts personal property which is subject to a chattel mortgage is liable to the mortgagee for the full amount due under the mortgage. (*De Costa v. Comfort*, 80 Cal. 507, [22 Pac. 218].) Respondent, while conceding the correctness of this proposition, insists that as an authority it is inapplicable to the instant case, for the reason that, as shown by the complaint, the conversion by defendant occurred prior to the time of the execution of the mortgage. This contention is based upon the allegation "that said automobile was at said time, and ever since has been, in the possession of the defendant." There is nothing in the fact so stated inconsistent with the mortgagor's right, as alleged owner, to mortgage the same. We must assume, since, as alleged, defendant had no right, title, claim, or interest therein, that he held the automobile as agent or trustee of the mortgagor. The owner of property may execute a valid mortgage thereon, notwithstanding the fact that the chattel may be in the actual possession of another. Until the mortgagee made default in the payment of the note, she, in person or through her agent, was entitled to possession of the automobile. The act of defendant after default in the payment of the note, when, having no right, title, or interest therein, he refused upon written demand of plaintiff to deliver the same to him, constituted a conversion of the property, and under the allegations of the complaint, if true, rendered him liable to plaintiff for the amount of the mortgage.

The ruling of the trial court, as we gather from respondent's brief, was based upon the assumption that the conversion occurred prior to the execution of the mortgage; whereas it appears from the complaint that Dailey at the time of the execution of the mortgage was the actual owner of the automobile, which at the time was in the possession of defendant, who had no right, claim, or title thereto, and the conversion occurred when he refused on demand to deliver the same to plaintiff, who, under the terms of the mortgage, was entitled to the property.

The judgment is reversed.

Conrey, P. J., and James, J., concurred.

[Crim. No. 729. First Appellate District.—May 22, 1918.]

**THE PEOPLE, Respondent, v. FRANK SOLDAVINI,  
Appellant.**

**CRIMINAL LAW—MURDER—DEFAMATION OF FAMILY OF DECEASED—EVIDENCE—REBUTTAL OF TESTIMONY OF DEFENDANT—IMPROPER ADVANCES TO WIFE OF DECEASED.**—In a prosecution for the crime of murder, it was not error to permit the wife of the deceased to testify that the defendant had made improper advances to her several months previous to the homicide, where the purpose of such evidence was to rebut the testimony of the defendant that he had never defamed the family of the deceased or had ever done anything to him as a traitor.

**APPEAL** from a judgment of the Superior Court of Marin County. Edgar T. Zook, Judge.

The facts are stated in the opinion of the court.

C. V. Riccardi, and Jeff L. Maloy, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

**THE COURT.**—The defendant was charged by information with the murder of one Tacchi, alleged to have been committed on the twenty-sixth day of October, 1917, in Marin County. He was tried and convicted of manslaughter, an indeterminate sentence being imposed. From the judgment and from an order denying a new trial defendant appeals.

The only question raised upon the appeal is whether the trial court erred in permitting the wife of the deceased to testify that the defendant had made improper advances to her several months previous to the homicide. During the trial there was introduced in evidence, without objection, a letter written by Tacchi to defendant, which contained veiled threats and in which Tacchi called the defendant "traitor," and from which it was apparent that ill feeling existed between them, the reason for the unfriendly relation being couched in ambiguous terms. The defendant, when asked what there was in the letter which made him feel so badly that he cried, replied, "There was there that I was a defamer and defam-

ing his family and those things." Upon redirect examination the defendant denied that he had ever defamed Tacchi's family or that he had ever done anything to him as a traitor. To rebut this testimony it was proper to permit in evidence testimony to the effect that the defendant, several months prior to the homicide, had made improper advances to the wife of the deceased. It was also proper testimony to explain the insinuations contained in the letter as to the reason of the unfriendly relation between the deceased and defendant. (Code Civ. Proc., sec. 1854.)

But even if the admission of the evidence in question were erroneous, the judgment should not be set aside, for an examination of the entire cause shows that no miscarriage of justice occurred.

**Judgment affirmed.**

---

[Civ. No. 2274. Second Appellate District.—May 22, 1918.]

**KATIE NAVE, Appellant, v. DAVID GRAHAM et al.,  
Respondents.**

**ACTION FOR SLANDER—PLEADING—DENIAL ON INFORMATION AND BELIEF INSUFFICIENT.**—In an action for slander, the defendant cannot deny the use of the words alleged to have been used, upon information and belief, as under section 437 of the Code of Civil Procedure positive knowledge is presumed.

**ID.—DENIALS UPON LACK OF INFORMATION INSUFFICIENT.**—In an action for slander, an answer containing denials of the allegations of the complaint based upon lack of information sufficient to form a belief is insufficient.

**NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DENIAL OF MOTION—APPEAL.**—An adverse ruling on a motion for a new trial on the ground of newly discovered evidence will not be disturbed on appeal, in the absence of a plain showing of abuse of the power of the court.

**APPEAL—ALTERNATIVE METHOD—RECORD.**—On an appeal from a judgment under the alternative method, the appellate courts are not required to examine the typewritten transcript, but the parties must print in their briefs the portion of the record to which they desire to call the court's attention.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Charles Monroe, Judge.

The facts are stated in the opinion of the court.

E. M. Barnes, for Appellant.

F. W. Allender, for Respondents.

JAMES, J.—Action for damages alleged to have been suffered by reason of slanderous statements made by the defendant Mary Graham. Judgment was for the defendants. The appeal purports to be taken both from the judgment and from an order denying to plaintiff a new trial. The appeal from the order is unauthorized by the code (Code Civ. Proc., sec. 963), although all the questions sought to be presented thereunder are proper to be considered on the appeal from the judgment. It is stated in the brief of appellant that the action was brought to recover damages because of false and malicious statements made by defendant Mary Graham concerning the condition of a dwelling-house owned by the plaintiff, by reason of which statements plaintiff was prevented from finding a tenant for the house.

Appellant first complains that the court erred in refusing to strike out portions of the answer. Also in refusing to sustain a demurrer interposed to the answer. The appeal is presented under the alternative scheme, a choice of method which requires the parties to print in their briefs the portions of the record to which they desire to call the court's attention. Many members of the bar, in presenting typewritten transcripts allowed on appeal by the alternative method, evidently assume, and erroneously, that the appellate courts will examine the typewritten matter. The code provision is plain and imposes no such burden upon these courts, as has been repeatedly held in recent decisions. (*Barker Bros. v. Joos*, 36 Cal. App. 311, [171 Pac. 1085], with collection of cases.) In so far as the text of the answer of defendants, which appellant prints in her brief, can be considered as sufficiently illustrating the points, it may be examined. The answer first contained denials of the allegations of the complaint based upon lack of information of defendants "sufficient to form a belief." Examining the order of the court, as counsel has set it forth in his brief, we cannot tell just what parts of the motion to strike out were granted and which denied. However, appellant does state that two paragraphs containing denials in



the qualified form above noted were stricken out. They embrace allegations denying the use of the words said to have been employed by defendants, the using of which could not be denied upon information and belief, as positive knowledge of that matter would be presumed against defendants. The particular objection urged against other denials couched in similar form is that it is insufficient to state that a party "has not information or knowledge sufficient to form a belief" and so deny assertions of the opposite pleader. The code provides that "if the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground." (Code Civ. Proc., sec. 437.) We are prepared to agree with appellant that the denials of the answer in the form in which they were phrased were not those authorized by the code, but for reasons which will be stated hereinafter, no prejudice could have come to the plaintiff because of the refusal of the court to strike them out. In a separate count of the answer defendants set up facts showing that the alleged false statements were true, and, we think, as to this defense the demurrer for uncertainty was properly overruled. When we examine the instructions given by the court we find that the trial judge directly advised the jury that the speaking of the alleged slanderous words was admitted by the defendant charged with having uttered them, and that the only issue remaining for determination was that arising upon the defense as to the truth of the matter, which the jury was told the defendants were required to show by a preponderance of the evidence. The instruction, therefore, took from the jury any question as to issue being raised by the denials objected to by the motion to strike out and assumed the facts in favor of the plaintiff. It is made plain, then, that the court's ruling on the motion to strike out portions of the answer, if erroneous, was without possible prejudice to the appellant.

On the motion for a new trial affidavits of various persons were presented as showing alleged newly discovered evidence. An adverse ruling on such a motion and on such grounds will not be disturbed on appeal in the absence of a plain showing of abuse of the power of the court. The question as to whether diligence had been used which might have enabled the moving party to have furnished the evidence at the trial,

and whether a different result would be probable had such evidence been produced, were matters which the court had discretion to determine either way under the statements made in the affidavits. (*Oberlander v. Fixen Co.*, 129 Cal. 690, [62 Pac. 254] ; *People v. Buckley*, 143 Cal. 392, [77 Pac. 169].)

We find no error pointed to in the brief of appellant involving rulings of the court on the admission of testimony or refusal to give pertinent instructions offered.

The judgment is affirmed.

Conrey, P. J., and Works, J., *pro tem.*, concurred.

---

[Civ. No. 2307. Second Appellate District.—May 22, 1918.]

L. M. HUEY, Respondent, v. A. T. PATTERSON et al.,  
Appellants.

**CORPORATION LAW — TRANSFER OF PROPERTY — ISSUANCE OF STOCK BY TRANSFEREE—VALIDITY OF TRANSACTION—QUESTION NOT PRESENTABLE IN STOCKHOLDERS' LIABILITY ACTION.**—In an action to recover judgment upon the statutory liability of certain stockholders of a corporation, the defendants cannot question the validity of a transaction between the corporation and its corporate predecessor in business, by the terms of which the assets and business of the latter were taken over by the former and stock in the new corporation issued to the stockholders, although the transaction was in violation of section 309 of the Civil Code and sections 1227–1232 of the Code of Civil Procedure.

**ID.—ACTION UPON STOCKHOLDERS' LIABILITY—OWNERSHIP OF STOCK—EVIDENCE.**—In an action upon the statutory liability of stockholders in a corporation, proof of ownership of stock at a certain time is sufficient to show ownership at the time the liability was incurred, in the absence of evidence to the contrary.

**ID.—VOID ASSESSMENT—RECOVERY OF MONEY PAID.**—Stockholders of a corporation may recover of the corporation the amounts paid by them under a void assessment.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. John M. York, Judge.

The facts are stated in the opinion of the court.

Manning, Thompson & Hoover, and Andrew M. Strong, for Appellants.

H. W. Kidd, and A. W. Ashburn, for Respondent.

WORKS, J., *pro tem.*—This is an action to recover judgment upon the statutory liability of certain stockholders of the Growers' Home Canneries Company, a corporation, which will hereafter, for convenience, be referred to as Second Company. That company was, under an arrangement which later will be stated more fully, the successor in business of the Growers' Home Canning Company, a corporation, which will be called, henceforth, First Company. The plaintiff sued as assignee of various holders of claims against Second Company, consisting of seven promissory notes, aggregating a total principal sum of \$5,229, and a further claim for \$750 principal, money loaned but for which no promissory note was given, or, in all, the principal sum of \$5,979. Judgment was rendered against the defendants for their proportionate shares of this amount. The appeal is from the judgment.

One of the contentions of the appellants is that the arrangement by which Second Company succeeded to First Company was void. That arrangement is set forth in an agreed statement of facts found in the record and was, in effect, as follows: At a meeting of the stockholders of First Company there was passed a resolution providing that Second Company be organized with a certain capitalization; that the president and secretary of First Company be instructed to incur the expense necessary for the incorporation of Second Company; that the stockholders of First Company be asked to consent to the transfer of its assets to Second Company and to accept stock in the new company in lieu of their stock in the old in the proportion of ten shares for one, on account of the difference in the par value of the shares; and that all of the stockholders of First Company be given stock in Second Company in proportion to their holdings. All the appellants were holders of stock in First Company, were present at the meeting, and voted in favor of the resolution. At the same meeting it was voted that First Company offer to sell its plants, business, and all its property and to transfer its cash on hand and outstanding accounts to Second Company, the latter to assume the liabilities of First Company, all in consideration

of the shares of stock of Second Company to be issued to the stockholders of First Company in proportion to their holdings of its stock, and that the president of First Company be authorized to execute the deeds, assignments, bills of sale, and other papers necessary to carry out the terms of the offer. The motion included a draft of a letter to be transmitted to Second Company, setting forth the terms of the offer, and was carried unanimously. At the same meeting, Second Company already having been incorporated, a letter was received from it, by which the offer of First Company was accepted. Thereupon, a motion was adopted by which the communication from Second Company was ordered received and placed on file and by which the president of First Company was authorized to execute the instruments necessary to effectually carry out the transaction. On the day on which the meeting of the stockholders of First Company was held, there was also convened the first meeting of the stockholders of Second Company. The agreed statement of facts shows that on or about that day each of the appellants subscribed for small holdings of the capital stock of Second Company and each of them was present at the meeting. A resolution was adopted which recited a receipt of the above-mentioned offer from First Company and which authorized the directors of Second Company to accept the proposition, to purchase the property of First Company upon the terms of the offer, and to issue stock in accordance therewith. The appellants each voted for the resolution. The corporations thereafter executed and issued all the instruments and certificates of stock necessary to effectuate the contemplated transaction.

The contention that this arrangement was invalid is based upon section 309 of the Civil Code and sections 1227-1232 of the Code of Civil Procedure. Speaking generally, but yet in terms sufficient for our present purpose, the section of the Civil Code forbids directors of corporations to make dividends on stock except from surplus profits, or to divide, withdraw, or pay to the stockholders any part of capital stock; and the sections of the Code of Civil Procedure provide a scheme for the dissolution of corporations upon notice and by a special proceeding instituted in the superior court.

Dealing with the question of the validity of the transaction between the corporations as measured by the provisions of both section 309 of the Civil Code and sections 1227-1232 of

the Code of Civil Procedure, we need concern ourselves only with an inquiry as to whether the appellants are in a position to invoke the terms of the statute. The point made by the appellants goes only to the alleged attempt to divide the capital stock of First Company among its stockholders and to work a dissolution of that corporation, and has no bearing whatever upon the question of the existence of Second Company or upon the query as to whether the appellants are stockholders in it. Any infirmity in the arrangement between the two corporations, because of the sections of the codes which are cited, is of concern only to those having an interest, either as creditors or stockholders, in the property of First Company. The appellants, objecting alone as stockholders of Second Company, and in an action to which First Company is a stranger, are in no position to present the question. These considerations are based on *O'Dea v. Hollywood Cemetery Assn.*, 154 Cal. 53, 67, [97 Pac. 1].

The obligations which are the basis of this action were incurred by Second Company in January and September, 1913, and in May, 1915. Under the language of section 322 of the Civil Code, relating to the liability of stockholders for corporate debts, the burden of proof was upon the respondent to show the number of shares of the stock of the corporation held by each stockholder "at the time the debt or liability was incurred." The agreed statement of facts shows who were the stockholders on or about December 11, 1912, and shows the number of shares owned by each, but it does not make such a showing as of any other time. The appellants contend that this condition of the agreed statement does not sustain the burden cast upon the respondent; but the rule is established in a number of cases that where the state of the title to property is shown as of a particular time, the same condition is presumed to exist until the contrary appears. Under this rule there appears to be no distinction between the different classes of property, as some of the cases relate to realty (*Hohenshell v. South Riverside L. & W. Co.*, 128 Cal. 627, 631, [61 Pac. 371]; *Jennings v. Jordan*, 31 Cal. App. 335, 339, [160 Pac. 576]), while others apply the doctrine in the case of personal property (*Fredericks v. Tracy*, 98 Cal. 658, [33 Pac. 750]; *Newlove v. Pond*, 130 Cal. 342, [62 Pac. 561].) We are satisfied that the showing in the agreed statement of

facts, there being no evidence to the contrary in the record, is sufficient to support the judgment.

Several of the notes sued on were executed by Second Company for the purpose of reimbursing the payees, who were stockholders in the corporation, in amounts paid by them into the corporate treasury upon a certain invalid assessment upon the corporate stock. The appellants contend that there can be no recovery upon these notes for the reason that the stockholders who advanced their respective portions of the void assessments had no cause of action against the corporation for the recovery of their money, antecedent to the execution of the notes; and it is of course true that the liability of stockholders, in such an action as this, must be measured by the question whether an original obligation of their corporation is enforceable by its holder. The liability of stockholders is not primarily predicable upon notes, the execution of which is based upon pre-existing obligations. (*Hunt v. Ward*, 99 Cal. 612, [37 Am. St. Rep. 87, 34 Pac. 335]; *Santa Rosa Nat. Bank v. Barnett*, 125 Cal. 407, [58 Pac. 85]; *Gardiner v. Royer*, 167 Cal. 238, [139 Pac. 75]), but upon the pre-existing obligations themselves. Was there, then, a legal liability upon the corporation to return the amounts advanced on account of the void assessment? It appears that this specific question has never been answered in California, nor have we, despite the fact that appellants cite cases from other states to the point, been able to ascertain that it has been passed upon elsewhere, even after some research of our own. There are principles of law, however, announced in decisions of the California courts, which furnish an analogy giving us much aid in the determination of the question. For instance, it is well settled that a corporation which receives and retains the fruits of a contract *ultra vires* cannot be heard to assert the invalidity of the contract in an action brought to recover upon it. (*Main v. Casserly*, 67 Cal. 127, [7 Pac. 426]. See, also, *Standard Oil Co. v. Slye*, 164 Cal. 435, 445, [129 Pac. 589].) Also, there is a long line of cases beginning as early as *Argenti v. San Francisco*, 16 Cal. 255, laying down the very just rule that a municipal corporation which has obtained the money or property of another through mistake or without legal right may be compelled to return it as upon an implied contract. Some of these cases are on principle closely allied to the one now before us. (*County of Los Angeles v. City of*

*Los Angeles*, 65 Cal. 477, 480, [4 Pac. 453]; *County of Colusa v. County of Glenn*, 117 Cal. 434, [49 Pac. 457]; *Higgins v. San Diego Water Co.*, 118 Cal. 524, 555, [45 Pac. 824, 50 Pac. 670]; *Contra Costa Water Co. v. Breed*, 139 Cal. 432, [73 Pac. 189].) The language used in the opinion in the first case of this group is particularly apposite. Certain fines belonging to Los Angeles County had been paid into the treasury of the city of Los Angeles by mistake. The county sued the city to recover the diverted moneys and the supreme court said, in disposing of the question: "Under a mistaken belief that they were legally liable to pay over these fines into the city treasury, the officers reported and paid them to the city, and the city treasurer doubtless received them under the same mistake. But this disposition of them was not authorized by law; and as the city, by the mistake of its officers in the performance of their duty, has obtained money which under the law ought to have been paid into the county treasury, it ought not in justice to be kept; it is the duty of the city to refund it. 'If,' says Mr. Justice Field in *Argenti v. San Francisco*, 16 Cal. 255, 'the city obtain money of another by mistake or without authority of law, it is her duty to refund it—not from any contract entered into by her on the subject, but from the general obligation to do justice which binds all persons, whether natural or artificial.' " We conclude that, under the facts of the present case, the stockholders who paid the amounts attempted to be charged against them by reason of the invalid assessment could have maintained an action against the corporation for their return, and that, therefore, the liability of the stockholders attaches.

It is objected by appellants that a liability against them as stockholders does not exist in the case of certain other promissory notes upon which respondent sues. These notes were originally given to stockholders of the company for advances made by them, and the question arises, upon the point made by appellants, as to whether the advances were loans or were voluntary assessments by the stockholders against their own stock. The appellants make much of the fact that the advances were in amounts equal to five per cent of the par value of the holdings of the stockholders, and they cite cases to the effect that a voluntary contribution by stockholders to the funds of a corporation, to tide it over financial difficulties, is for the betterment of their stock and does not create a debt

against the corporation. These authorities are not in point, for the records of the corporation show that the advances were loans, pure and simple. At a special meeting of the directors it was stated that it was necessary to raise a certain sum of money "in order to pay off current and past due bills." A resolution was then adopted authorizing the president and secretary to borrow the amount and to execute a note for it. Some of the directors then indicated a willingness "to make the loan to the Co.," whereupon the money was paid over and a note was taken by a certain individual as trustee for the lenders. The promissory note was given in the ordinary form, as the resolution authorizing its execution required the insertion of no special terms in it; but the minutes show, after what they disclose as to the willingness of the stockholders to lend the needed money, that "it was further stipulated above-mentioned note . . . is to be paid from sales of merchandise or from sales of the treasury stock of the corporation." This "stipulation" is no part, in form, of any resolution or motion, but, even if it be treated as a motion, it could not operate to limit the terms of the promissory note. If it be conceded to have any operation whatever as to the lenders, it can amount to nothing more than an indication of a willingness on their part to await for some time the payment of the note. Under all these circumstances it plainly appears that the advances by the stockholders were not voluntary contributions, but that they fixed the relation of creditors and debtor between the stockholders and the corporation.

It is contended by the appellants that the claim for \$750, not evidenced by a promissory note, is barred by the statute of limitations, section 338 of the Code of Civil Procedure fixing a limitation of three years for the commencement of a certain class of actions, which includes those like the present one. The question arises under the following facts: Second Company was indebted upon a certain promissory note executed by First Company, which Second Company had assumed, and on which one of the stockholders of both corporations, E. B. Rivers, was an accommodation indorser and guarantor. This note was dated more than three years before the commencement of the action. The note was for \$1,750 and one thousand dollars had been paid upon it at a certain time. At a date within three years before the commencement of the action, demand was made upon Second Company for payment



of the balance due but the demand was not complied with. Thereupon demand was made upon Rivers and he paid, taking an assignment of the note. A new obligation arose in favor of Rivers upon the payment of the note by him and the statute began to run at that time upon that obligation. (*Yule v. Bishop*, 133 Cal. 574, [62 Pac. 68, 65 Pac. 1094]; *McDonough v. Nowlin*, 17 Cal. App. 45, [118 Pac. 463].) The fact that Rivers took an assignment of the note cannot affect the principle just stated, for the reason that the claim for the amount paid by him is not based upon the note. The claim is not barred.

There are two or three other points presented by the appellants but they do not merit a specific consideration.

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 18, 1918.

---

[Civ. No. 2284. Second Appellate District.—May 23, 1918.]

WM. H. MOORE, Jr., as Trustee, etc., Respondent, v.  
ARTURO GUAJARDO, Appellant.

**APPEAL—ALTERNATIVE METHOD—PRESUMPTION AS TO RECORD.**—Where the record on appeal from a judgment is prepared under the alternative method, without a printed transcript, the law presumes, without examining the typewritten transcript, the court will rely solely upon those portions of the record which the parties print in their briefs.

**ID.—INSUFFICIENCY OF EVIDENCE TO SUPPORT FINDINGS—DEFECTIVE RECORD—MATTER NOT REVIEWABLE.**—On an appeal from a judgment taken under the alternative method, the insufficiency of the evidence to sustain the findings cannot be considered where there is not printed with the appellant's brief a copy of the notice of appeal or any part of the judgment-roll, and the brief contains only extracts of the evidence.

APPEAL from a judgment of the Superior Court of Imperial County. Franklin J. Cole, Judge.

The facts are stated in the opinion of the court.

Ault & Frazier, for Appellant.

Wm. P. Butcher, and W. T. Craig, for Respondent.

CONREY, P. J.—In their brief, counsel for appellant inform us that this is an appeal by defendant from an adverse judgment rendered upon the second cause of action set out in plaintiff's complaint; and that "the solitary ground of appeal is that the evidence is insufficient to sustain the findings." The record on appeal has been prepared under the alternative method, without a printed transcript. Upon an appeal presented in this manner the law presumes that, without examining the typewritten transcript, the court will rely solely upon those portions of the record which the parties print in their briefs. (Code Civ. Proc., sec. 953c; *Barker Bros. v. Joos*, 36 Cal. App. 311, [171 Pac. 1085].)

Appellant has not printed with his brief a copy of his notice of appeal, nor has he printed any part of the judgment-roll. Therefore, we have not before us any of the findings which he says the evidence is insufficient to sustain. Counsel tell us in their brief that said second cause of action is one in *quantum meruit* for the reasonable value of lumber alleged to have been furnished to the defendant at his request, used in the erection of a certain building. They say that the evidence is insufficient to show that the lumber was furnished at the request of the defendant. They have printed some extracts from the evidence, but do not even assert it to be a fact that these extracts constitute the whole of the evidence relating to the supposed issue. That there was other evidence on that subject is shown by additional extracts from the evidence as printed in the brief for respondent. These additional extracts as produced by the respondent do tend to show that the lumber was furnished at the request of the defendant.

From the record as presented to us for consideration, we are unable to ascertain what findings were made and we are unable to ascertain that the evidence is insufficient to support any finding made.

The judgment is affirmed.

James, J., and Works, J., *pro tem.*, concurred.

[Crim. No. 430. Second Appellate District.—May 27, 1918.]

In the Matter of the Application of FRED H. THOMPSON  
for Reinstatement as a Member of the Bar of the State  
of California.

**ATTORNEY AT LAW—SUSPENSION FROM PRACTICE—RECORD OF FOREIGN COURT—PROCEDURE.**—An attorney at law can be removed or suspended upon the record of a foreign court convicting him of a crime involving moral turpitude, without notice and without giving him an opportunity to be heard or to answer to the sufficiency of the record or to deny the allegations therein contained.

**ID.—CRIMES DENOUNCED BY REVISED STATUTES OF UNITED STATES—WHEN CAUSE FOR DISBARMENT.**—The crimes denounced by section 5470 of the Revised Statutes of the United States are within the terms of section 287 of the Code of Civil Procedure whenever they involve moral turpitude.

**ID.—CONCEALMENT OF STOLEN CURRENCY—CRIME INVOLVING MORAL TURPITUDE.**—The crime of receiving currency from one who has stolen it from the mails, and to conceal and aid in the concealment of it, is a crime involving moral turpitude.

**ID.—APPLICATION FOR REINSTATEMENT TO PRACTICE—INSUFFICIENCY OF EVIDENCE.**—An application by an attorney at law for reinstatement to practice upon the ground of reformation of character cannot be considered where the letters asking for such reinstatement are from attorneys residing out of the state and their signatures are not verified.

APPLICATION originally made to the District Court of Appeal for the Second Appellate District for reinstatement as a member of the Bar of the State of California.

The facts are stated in the opinion of the court.

Ingle Carpenter, for Petitioner.

James A. Gibson, Jr., for Respondent Los Angeles Bar Association.

**WORKS, J., pro tem.**—On January 6, 1911, the petitioner, together with another, was indicted by the United States grand jury for a violation of the terms of section 5470 of the Revised Statutes of the United States. [U. S. Comp. Stats. 1916, sec. 10,364; 5 Fed. Stats. Ann., 1st ed., p. 968], which

provides, in effect, that "Any person who shall buy, receive, or conceal, or aid in buying, receiving, or concealing" any of various documents, contracts, evidences of indebtedness, or articles, all of which are specifically mentioned in the statute, "knowing any such article or thing to have been stolen or embezzled from the mail, or out of any postoffice, branch post-office or other authorized depository for mail matter, or from any person having custody thereof, shall be punishable by a fine of not more than two thousand dollars, and by imprisonment at hard labor for not more than five years." The indictment was in four counts. The first count charged that the petitioner and his associate "did willfully, knowingly, unlawfully and feloniously receive from one Orlando F. Altorre . . . and conceal and aid him . . . in concealing certain articles and things of value, to wit: divers notes of the national bank currency . . . and divers United States notes, treasury notes, legal tender notes, gold certificates and silver certificates, . . . in the whole amounting to and representing . . . the sum of . . . \$5000, and of the value of . . . \$5000, . . . which . . . had theretofore been willfully, knowingly, unlawfully and feloniously stolen, taken and carried away from the mails of the United States, in the Post Office . . . at the City of Los Angeles . . . by the said Orlando F. Altorre, . . . the said Fred H. Thompson . . . then and there . . . well knowing the same . . . to have been so willfully, knowingly, unlawfully and feloniously stolen, taken and carried away from the said mails of the United States, as aforesaid, and well knowing said 'articles' to be then and there articles and things of value feloniously stolen, taken and carried away from said mails of the United States, as aforesaid." The remaining three counts, although differently worded, were in effect the same as the first count, so far as any of the questions involved in the present proceeding are concerned, one of them being related to currency of the value of five thousand dollars, and the two others to currency of the value of ten thousand dollars. Upon a trial in the United States district court in and for the southern district of California, the petitioner was found guilty as charged in the indictment. On the first count he was sentenced to pay a fine of one thousand dollars and to be imprisoned in the United States penitentiary at McNeil Island, Washington, for a term of four years, at hard labor. The sentence was the same upon the third count, the

imprisonment under that count to commence at the conclusion of the term for which sentence was pronounced under the first count. The sentence was imposed on January 3, 1912. The petitioner prosecuted a writ of error to the United States circuit court of appeals, but the judgment was affirmed on February 3, 1913. (*Thompson v. United States*, 202 Fed. 401, [47 L. R. A. (N. S.) 206, 120 C. C. A. 575].)

On July 16, 1915, the Los Angeles Bar Association filed with the supreme court of the state an accusation against the petitioner, alleging his conviction of the crimes above mentioned. A certified copy of the record of conviction was filed with the accusation. On August 10, 1915, the supreme court made its order transferring to this court the proceeding instituted by the filing of the accusation and record of conviction, and, on August 12, 1915, this court, without notice to the petitioner, entered its order disbaring him and striking his name from the roll of attorneys. On November 9, 1916, the petitioner filed with this court his application for reinstatement as a member of the Bar upon the ground of a reformation of his character. The application was never insisted upon until February 15, 1918, when he filed a paper in the nature of a supplemental application for reinstatement, in which the position is also taken that the order of disbarment is void.

The order was made pursuant to the provisions of subdivision 1 of section 287 of the Code of Civil Procedure, to the effect that "an attorney and counselor may be removed or suspended" upon "his conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction shall be conclusive evidence." At the beginning of his brief the petitioner propounds the following question, as a basis for his argument: "Can an attorney at law, upon the record of a foreign court, without notice and without an opportunity to be heard or to answer to the sufficiency of the record or deny the allegations therein contained, be removed or suspended?" To the question thus broadly and generally stated an affirmative answer must be returned upon the authority of a case recently decided by this court, in which the record of conviction came from the same tribunal which passed sentence upon the petitioner (*In re Shepard*, 35 Cal. App. 492, [170 Pac. 442]); and the opinion in that case answers, as well, practically all the specific points now presented for our consideration by the petitioner in support of the gen-

eral question above stated. The questions which it does answer will receive no mention in this opinion beyond the statement just made.

Petitioner contends that "resort must be had to the laws of the United States to determine the grade of the offense" of which he was convicted. He insists that the Congress of the United States has not provided, in its penal legislation, a division of crimes into the two classes, felonies and misdemeanors, a division which is general under the laws of the various states. But the petitioner does not mean that, for according to section 335 of the Federal Penal Code of 1910 (Act Cong. March 4, 1909, c. 321, 35 Stat. 1152 [U. S. Comp. Stats. 1916, sec. 10,509, 7 Fed. Stats. Ann., 2d ed., p. 987]), generally so-called, "All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors." On March 4, 1909, and by the terms of the section quoted, the Congress appears for the first time to have marshaled all crimes against the laws of the United States under such an arrangement. The section, along with the general provisions of the code mentioned, went into effect on January 1, 1910. The petitioner does not argue that section 335 of the Federal Penal Code has no application in this proceeding, because of its having taken effect after the commission of the petitioner's offense; but he apparently assumes it, and the question at once suggests itself. It is not, however, necessary to decide it in this proceeding, and we may go forward as if the Congress of the United States never had enacted such a measure.

Section 17 of our Penal Code is as follows: "A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor." Manifestly, then, under California law, all crimes are either felonies or misdemeanors. Manifestly, also, section 17 was enacted for the purpose of providing a convenient division of crimes into the lesser and the greater, to the end that, in other legislation, the terminology and segregation provided by that section might be taken advantage of whenever, in such legislation, it became necessary to draw a distinction or to allow a difference between crimes of the greater and crimes of the lesser magnitude. But in section 287 of the Code of Civil Procedure no distinction is made between the two grades of offense. It is true that the terminology of section 17 is there

adopted, but not for the purpose of making use of the segregation there devised. Section 287 is as all-inclusive of crimes as is section 17 itself. The former is to be read as if, in terms, it provided for the removal of an attorney for the "conviction of any crime involving moral turpitude," for such is its legal effect. Therefore, the crimes denounced by section 5470 of the Revised Statutes of the United States are within the term of section 287 of the Code of Civil Procedure whenever they involve moral turpitude.

The petitioner takes the position that the crime of which he was convicted does not involve moral turpitude and that the order of disbarment should be set aside for that reason. Many of the courts of the land have approved the definition given in Bouvier's Law Dictionary, to the effect that "everything done contrary to justice, honesty, modesty or good morals, is done with turpitude." The offense committed by the petitioner comes within that definition. To receive fifteen thousand dollars in currency from one who has stolen it from the mails, and to conceal and aid in the concealment of it, the receiver taking the money with knowledge of the theft, is surely not consonant with the principles of natural justice. Such a course of conduct is as surely dishonest and immoral. In addition to the definition of Bouvier, we may refer to the opinion in the *Matter of Coffey*, 123 Cal. 522, [56 Pac. 448], in which one convicted of attempted extortion is held to be guilty of an offense involving moral turpitude and in which the definition is approved and adopted.

These considerations cover all the points made by way of assault upon the integrity of the order of disbarment. There yet remains the question whether the petitioner is entitled to a reinstatement because of a reformation of his character. No satisfactory evidence is furnished us showing either that the petitioner has reformed or that he has not. Several letters bearing upon the question of his conduct and character are now before us. None of them is verified and the names of all the signers of them, except three, are appended in typewriting. A proceeding of this character presents serious questions for the consideration of a court. As we said, in effect, in the opinion in *In re Shepard, supra*, such a proceeding is one in which the public has a large interest. Whenever a lawyer has suffered disbarment, the order has been made principally with a view to the protection of the public from

the possibility of harm being wrought by one who, having once been licensed to practice law, has been found unworthy the confidence of those who may need the services of lawyers. When a reinstatement is asked by one resting under such a judgment, his request cannot be granted except upon some formal showing of a reformation of character. It has been the usual practice in California to receive, in support of such applications, evidence in the form of affidavits (*In re Treadwell*, 114 Cal. 24, [45 Pac. 993]; *In re Shepard*, 35 Cal. App. 492, [170 Pac. 442]), although, in the Shepard case, an unverified petition was presented as coming from a considerable number of judges and lawyers, in addition to the affidavits there considered. An opinion in another case refers to the evidence of reformation as having been in the form of "testimonials" signed by judges of the superior court and prominent attorneys. (*In re Burris*, 147 Cal. 370, [81 Pac. 1077].) These testimonials and the above-mentioned petition in the Shepard case came from judges and lawyers of California, all of whom were probably known to the courts which passed upon the cases, and all of whom were morally bound by their oaths as attorneys at law not to recommend a disbarred attorney for reinstatement in the courts of their state unless they were satisfied of the rehabilitation of his character. (Code Civ. Proc., sec. 282, subds. 1, 2.) In the present proceeding there are nine signers of letters asking the reinstatement, including those whose names appear in typewriting, one or two of the communications being signed jointly by several. Of the nine, seven are lawyers, but they all reside in the state of Washington, where the petitioner also has had his residence. One of the remaining two signers is presumably a resident of California, as his letter was written from a place within the state. There is no evidence upon which to consider the petitioner's application for reinstatement.

The application is denied.

Conrey, P. J., and James, J., concurred.



[Civ. No. 2138. Second Appellate District.—May 27, 1918.]

MARGARET TRACY, Executrix, Appellant, v. C. W.  
DONOVAN, Respondent.

**TENANCY AT WILL—MODE OF TERMINATION.**—Where a tenant enters agricultural land under oral agreement for lease for two years, and occupies the land for two years, rendering an annual rent which is accepted by the owner, the tenancy thus created must be terminated by the notice prescribed in section 789 of the Civil Code, before the tenant is liable to an action in unlawful detainer.

**APPEAL** from a judgment of the Superior Court of San Luis Obispo County. T. A. Norton, Judge.

The facts are stated in the opinion of the court.

Alex Webster, and Wm. Shipsey, for Appellant.

Carlton W. Greene, for Respondent.

**CONREY, P. J.**—This is an action of unlawful detainer, wherein the plaintiff appeals from a judgment of nonsuit.

On the first day of October, 1913, the defendant entered upon the farm of the plaintiff, under a parol agreement of lease for a term of two years from that date, and has ever since remained in possession and farmed the land. The plaintiff was to receive as rental one-fourth of the crops raised on the land. This rental for each of those two years was paid. On September 29, 1915, the plaintiff visited the premises in question and orally stated to the defendant that she wanted him to vacate and that she had promised the place to another party. The plaintiff never served any written notice or demand upon the defendant until the twenty-seventh day of October, 1915. On that day she did serve upon the defendant a written demand for immediate surrender to her of the possession of said premises. The defendant having failed to comply with this demand, the plaintiff commenced this action on the ninth day of November, 1915. All of the foregoing facts appear from the evidence produced by the plaintiff at the trial of the case.

Respondent contends that where a tenant enters agricultural land under oral agreement for lease for two years, and

occupies the land for the two years, rendering an annual rent which is accepted by the owner, the tenancy thus created must be terminated by the notice prescribed in section 789 of the Civil Code, before the tenant is liable to an action in unlawful detainer. This is the principal ground upon which the motion for nonsuit was made by the defendant and granted by the court. The rule at common law, as established by both English and American decisions, appears to be that, although a lease by parol may be void, as exceeding the period allowed by the statute of frauds, or the tenancy may, according to circumstances, be construed at will, or perhaps from year to year, it will nevertheless be governed, in respect to its termination, as well as to its other incidents, by the terms of the demise, and will expire at the time limited by those terms, without notice to quit. (See Taylor's Landlord and Tenant, 9th ed., secs. 80, 469, 471, with cases there cited.) But in California this common-law rule has been changed by statute. "A tenancy or other estate at will, *however created*, may be terminated by the landlord's giving notice in writing to the tenant, in the manner prescribed by section 1162 of the Code of Civil Procedure, to remove from the premises within a period of not less than thirty days, to be specified in the notice." (Civ. Code, sec. 789.) "After such notice has been served, and the period specified by such notice has expired, but not before, the landlord may re-enter, or proceed according to law to recover possession." (Civ. Code, sec. 790.)

When the defendant entered into possession of plaintiff's land, the plaintiff consenting thereto, under the circumstances shown by the evidence, defendant became a tenant at will. (*Carteri v. Roberts*, 140 Cal. 164, [73 Pac. 818].) When thereafter the defendant paid and the plaintiff accepted an annual rent for the premises, the defendant became a tenant from year to year. Was this an "estate for years," or does it come within the definition of an estate at will? (Civ. Code, sec. 761.) If the latter, then section 789 of the Civil Code is applicable to the case, and the tenancy cannot be terminated by the landlord without the notice thereby required. We are satisfied that it is a form of tenancy at will. (Jones on Landlord and Tenant, secs. 192, 194; Tiffany on Landlord and Tenant, p. 120.) "The tendency of the courts is to construe all general or doubtful

tenancies into estates from year to year; and parol leases which, under the statute of frauds, constitute estates at will, are turned into estates from year to year by the payment and acceptance of rent, or other circumstances indicating that that is the intention of the parties. . . . Such estates partake of the nature of an estate at will." (*Rosenblat v. Perkins*, 18 Or. 156, [6 L. R. A. 257, 22 Pac. 598].) Therefore, it was held that, under an Oregon statute similar to section 789 of our Civil Code, the tenancy would not be terminated without the notice required by the statute.

The judgment is affirmed.

James, J., and Works, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court. after judgment in the district court of appeal, was denied by the supreme court on July 26, 1918.

---

[Civ. No. 2168. Second Appellate District.—May 27, 1918.]

PASADENA RAPID TRANSIT COMPANY (a Corporation), Respondent, v. S. M. MUNSON, Appellant.

**CORPORATION LAW—RECOVERY OF SUBSCRIPTION PRICE OF STOCK—NATURE OF STOCK—SUPPORT OF FINDING—ABSENCE OF BILL OF EXCEPTIONS.**

In an action on a promissory note given for the subscription price of stock, it cannot be contended on appeal that the stock which the corporation is able to issue to the appellant is not the original issue for which he subscribed, but stock returned to the treasury charged with a contingent liability, where the appeal is taken upon the judgment-roll alone, without a bill of exceptions, since the finding of the trial court that the stock is the proper stock to be issued must be assumed to be supported by the evidence.

**ID.—CONTRACT FOR ORIGINAL ISSUE OF STOCK IN EXCHANGE FOR PROPERTY—SUBSCRIPTION TO STOCK.**—A contract for an original issue of shares of stock in exchange for property is in legal effect but a subscription to stock, even if it be not a subscription contract in form.

**ID.—CANCELLATION OF SUBSCRIPTION TO STOCK.**—A corporation may, under certain circumstances, and certainly as against all but existing creditors, cancel a subscription to stock, especially if the cancellation relate to only a part of the shares subscribed for.

APPEAL from a judgment of the Superior Court of Los Angeles County. George H. Cabaniss, Judge Presiding.

The facts are stated in the opinion of the court.

James S. Bennett, for Appellant.

Porter & Sutton, for Respondent.

WORKS, J., *pro tem.*—The appellant subscribed for certain shares of the capital stock of the respondent and the subscription contract was consummated prior to the organization of the respondent. A promissory note was given by the appellant to cover a part of the amount subscribed by him and this action was commenced to recover on the note. The plaintiff had judgment and the defendant appeals.

After the respondent was organized it issued all of its shares of stock, none of it, however, going to the appellant. A large block of the stock was issued to another corporation in payment for certain property which that corporation conveyed to the respondent; but on the same day that the shares were issued this second corporation transferred a considerable portion of its shares back to the respondent, "to be held," according to the findings of fact, "as treasury stock of plaintiff and to be sold for the benefit of plaintiff or issued to the subscribers for the capital stock of plaintiff." It is only out of this returned stock that the respondent is able to issue to the appellant any shares as and for the shares subscribed for by him. The appellant contends that this stock is not the stock for which the subscription was made, that he is entitled to an original issue from the treasury, that the consideration for the note has wholly failed, and that judgment should have been pronounced in his favor.

The theory behind the appellant's contention is, of course, that the stock which, alone, the respondent is able now to issue to him is charged with a contingent liability under the law (see *R. H. Herron Co. v. Shaw*, 165 Cal. 668, [Ann. Cas. 1915A, 1265, 133 Pac. 488]), different from the subscription or "trust fund" liability which would be incident to shares issued to him in the first instance, from the treasury of the respondent. The appellant does not, however, present such a record as enables him to make this contention. The appeal

comes to us upon the judgment-roll alone, without a bill of exceptions. Therefore, the trial court having found that the shares which were returned to respondent were to be held as treasury stock and were to be issued, in part, to the subscribers for the capital stock of the respondent, we are bound to assume that there was evidence to support the finding. (*Paine v. San Bernardino V. T. Co.*, 143 Cal. 654, [77 Pac. 659].) The finding means, necessarily, that the stock was *legally* returned to the treasury to be *legally* issued to subscribers, and without injury to their rights, if such a thing were possible under any state of facts which might have been presented to the trial court. It is well settled that a contract for an original issue of shares of stock in exchange for property is in legal effect but a subscription to stock, even if it be not a subscription contract in form. (Cook on Corporations, sec. 22.) It is equally well settled that a corporation may, under certain circumstances, and certainly as against all but existing creditors, cancel a subscription to stock, especially if the cancellation relate to only a part of the shares subscribed for (*Thomas v. Wentworth Hotel Co.*, 16 Cal. App. 403, [117 Pac. 1041, 1046]; *Silica Brick Co. v. Winsor*, 171 Cal. 18, [151 Pac. 425]); and there is nothing in the record before us to show that the respondent had creditors at the time the shares of stock in question were returned to the treasury.

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on June 25, 1918.

[Civ. No. 2242. Second Appellate District.—May 23, 1918.]

J. M. WILSON, Respondent, v. CLIFFORD A. FULLER,  
Appellant.

**CONTRACT — SINKING OF WELL — DEPTH AT WHICH DRILLING MIGHT BE STOPPED—CONSTRUCTION.**—A contract to sink a well to a minimum depth of one hundred and fifty feet, but not to exceed five hundred feet, and providing that the contractor might stop drilling after reaching the minimum depth, permits the driller to stop at any time after reaching one hundred and fifty feet.

**ID.—RECOVERY OF FULL AMOUNT EARNED — RIGHT OF CONTRACTOR.**—Under such a contract, the contractor can recover the full amount earned, although the contract required only half payment at the reaching of each one hundred feet in the digging.

**APPEAL** from a judgment of the Superior Court of Kern County. Milton T. Farmer, Judge.

The facts are stated in the opinion of the court.

E. L. Foster, and Chas. A. Barnhart, for Appellant.

W. W. Kaye, for Respondent.

CONREY, P. J.—By the findings of the court in this case the following facts appear: By agreement in writing plaintiff's assignor, J. H. Beck, agreed to drill a well for the defendant for which the defendant agreed to pay the sum of \$1.50 per foot for the first one hundred feet, and an increase of twenty-five cents per foot for each additional one hundred feet; one-half the contract price to be paid at the completion of each one hundred feet, "and the balance at completion of well." The contractor agreed "to sink such well to a minimum depth of 150 feet, but in no event to exceed a maximum depth of five hundred feet." The contract also provided that "after the minimum depth has been reached first party may stop drilling, and must stop drilling if requested by second party." By supplementary agreement made before the commencement of the work, it was arranged that the work should be done by Wilson under the supervision of Beck. After Wilson ceased work, as hereinafter stated, Beck assigned to Wilson all his interest in the contract.

When the well had been drilled to a depth of 174 feet Wilson ceased work thereon. The defendant failed and refused to pay to Wilson or to Beck the one-half of the contract price for the drilling of the well upon the completion of one hundred feet, and failed and refused to pay any sum of money upon the completion of the drilling of the well to said depth of 174 feet. The contract provided that in the event of default by the defendant in making any payment and the institution of suit to collect the same, defendant would pay a reasonable sum as attorney fees. It became necessary for the plaintiff to prosecute this action, and a reasonable attorney fee therein is the sum of \$50. The well was properly constructed to a depth of 150 feet. By reason of the carelessness and negligence of Wilson in not carrying the casing down with the hole as the same was being drilled, sand and debris from the walls of the well filled it up twenty-four feet from the bottom, whereby the work done by Wilson in putting down the last twenty-four feet was valueless. The defendant was obliged to employ another driller, one Schutz, to complete the drilling of the well, and was obliged to pay, and did pay, Schutz the sum of \$150 for moving his drilling rig and setting the same up over the said well for the drilling thereof, and for the redrilling of said well below the depth of 150 feet to 174 feet, as well as other sums paid to said Schutz for completing the well to a depth below 174 feet.

Upon the facts found the court determined that the plaintiff was entitled to judgment against the defendant in the sum of \$237.50, the price agreed upon in the contract for drilling the well to the depth of 150 feet, together with interest from the date when the work ceased to the entry of judgment herein, and for the sum of \$50 as attorney fees. The defendant appeals from the judgment.

The plaintiff's right to recover the sum allowed depends upon the construction to be given the terms of the contract. Appellant contends that the contract is a contract to drill a well to the depth of five hundred feet, and that the only time the contractor could stop drilling would be at the depth of 150 feet. We do not so understand the meaning of the contract. There was a minimum depth of 150 feet, to which depth the contractor was bound at all events to prosecute his work. Then he was given the privilege to stop drilling, not

merely "at" the depth of 150 feet, but "after the minimum depth has been reached."

Since the last twenty-four feet in depth of the well as drilled by Wilson was, by reason of Wilson's negligence, without value, he was not entitled to recover any compensation therefor. But the defendant may not receive any additional allowance as damages on that account, since the findings do not show how much of the money paid by him to Schutz was for redrilling, nor that the amount so paid was a reasonable sum. A part of the \$150 paid to Schutz was for moving his drilling rig and setting it up over the well. But this work was also done for the purpose of carrying the well to a lower depth, the expense whereof is not chargeable to the plaintiff. No suggestion is made by appellant that the findings are defective or erroneous.

The appellant further contends that at all events the judgment could not exceed \$75, because by the terms of the contract only one-half of the contract price should be paid at the completion of each one hundred feet. We think that, under a fair construction of the contract as a whole, the contractor was entitled to recover the entire amount which had been earned by him at the time when, in accordance with the privilege given him by the terms of the contract, he ceased work. It is very clear that this would have been so if, as specified in the contract, he had stopped drilling on request of the defendant; and we see no reason why the same result does not follow when the contractor, acting within his rights as given by the contract, stopped the work without such request.

The judgment is affirmed.

James, J., and Works, J., *pro tem.*, concurred.



[Civ. No. 2530. Second Appellate District.—May 28, 1918.]

**CHARLES A. CHASE, Respondent, v. HOMER H. PETERS, Jr., et al., Appellants.**

**UNLAWFUL DETAINER—SPECIAL NATURE OF PROCEEDING.**—The summary proceeding for obtaining possession of real property is special, and must be restricted to the particular purposes expressed in the code provisions.

**ID.—PLEADING—CROSS-COMPLAINT NOT ALLOWABLE.**—In the summary proceeding for obtaining possession of real property, a counterclaim or cross-complaint is not allowed.

**ID.—DAMAGES.**—In unlawful detainer, only those damages accruing during the actual period of the unlawful detention are recoverable.

**ID.—EXTENT OF RECOVERY.**—In unlawful detainer, no recovery is authorized of any money, the right to which accrued before the unlawful detention began, except arrearages of rents.

**ID.—ASSIGNMENT OF LEASE—PLEADING—PARTIES.**—In an action in unlawful detainer, where it appears that the lease did not prohibit an assignment, but provided that the contract should bind the lessee and his assigns, and the lessee prior to the accrual of any rents assigned the lease to a third person, the original lessee was not a proper party defendant.

**ID.—TAX CHARGES NOT RECOVERABLE.**—In unlawful detainer, tax charges paid by the lessor cannot be recovered.

**ID.—RECOVERY OF TAX CHARGES—PREJUDICIAL ERROR.**—In unlawful detainer, error in allowing recovery of taxes paid by the lessor and arrearages of rent from the original lessee are more than mere errors of pleading or procedure under section 4½ of article VI of the constitution.

**APPEAL** from a judgment of the Superior Court of San Diego County. W. A. Sloane, Judge.

The facts are stated in the opinion of the court.

Riley & Heskett, and Wright & McKee, for Appellants.

James E. Wadham, and Glen H. Munkelt, for Respondent.

**JAMES, J.**—In this action defendants, Homer H. Peters, Jr., Peters Investment Company (a corporation), and Fidelity and Deposit Company of Maryland (a corporation), have appealed from a judgment entered in favor of the plaintiff.

The appeal of the last-named defendant was separately taken and will be disposed of in the opinion filed in *Chase v. Peters*, *post*, p. 815, [174 Pac. 119]).

In September, 1912, plaintiff made a written lease with defendant Homer H. Peters, Jr., leasing for a term of ninety-nine years certain real property in the city of San Diego. Prior to October, 1916, Peters, Jr., assigned the lease and delivered possession of the premises to the defendant Peters Investment Company. The installments of rental for the months of November and December, 1916, and January, February, March, April, and May, 1917, were not paid. A three-day notice in writing requiring the payment of such rental to be made was served upon the appellants. This notice contained the usual alternative demand for possession. Compliance was not made with the terms of the demand and this suit in unlawful detainer followed. The terms of the lease required the lessee to pay all taxes assessed against the property. There was a failure on the part of those in possession of the premises under the lease to pay taxes in the year 1916 to the amount of \$3,132.28. Plaintiff asked and was allowed judgment for the amount of the taxes, as well as for accrued rental, against both of these appellants. These taxes the lessor was obliged to pay to protect his property from liens. The action, as characterized by the plaintiff, was distinctly a suit to recover possession of leased premises because of conditions broken, brought under the provisions of section 1159 et seq., Code of Civil Procedure. In his complaint the plaintiff set forth the facts concerning the lease transaction, showing the rent unpaid for the months named and also the amounts of the taxes which the lessor had been obliged to pay after default of the lessee in that particular. That the facts stated in the complaint, as we have briefly summarized them, were established by the evidence, is not disputed here. Homer H. Peters, Jr., and his successor under the lease, the Peters Investment Company, objected, both by demurrer and answer, to the complaint on the ground that there was a misjoinder of parties defendant and that different causes of action were improperly united.

The first contention amplified is that as appellant Peters, Jr., was not in possession of the premises at the time of the alleged unlawful detention thereof, he was not a proper party to the suit and no judgment could be legally rendered against

him. The point of misjoinder of parties defendant is also urged as to Peters Investment Company, but the argument in support thereof is not of the same potency as that available to defendant Peters, Jr., as will be developed in the discussion to follow. The second point assumes that both of the defendants were proper parties, but raises question as to the propriety of allowing a recovery for taxes paid by the lessor, which payments should have been discharged by the lessee or his successor; that this cause of action was one distinctly upon contract and could not be joined in a suit where the special relief authorized by the chapter dealing with the unlawful or forcible detention of real property is sought.

The summary proceeding provided for the obtaining of possession of real property is special and must be restricted in its use to the particular purposes expressed in the sections of the code embraced within chapter IV, title III, of the Code of Civil Procedure. The mode and measure of the plaintiff's recovery are therein limited. The law on this subject has been construed with strictness, for the relief authorized in some particulars is penal in its nature. The defendant is brought into court to answer within three days after issuance of summons (section 1167); amendments to the complaint are provided to be made without terms (section 1173); in the judgment the rents found to be due and damages may be trebled (section 1174). Other provisions designed to hasten the recovery of possession of the property as the main relief are included, which are all different from those affecting civil actions generally. A cross-complaint or counterclaim is not allowed. (*Arnold v. Krigbaum*, 169 Cal. 143, [Ann. Cas. 1916D, 370, 146 Pac. 423].) Rents accrued at the time of the commencement of the action are allowed to be recovered only because the statute so provides (section 1174). These rents are added to the damages for the unlawful detention. Under the last-mentioned head only those damages accruing during the actual *period of the unlawful detention* are recoverable. Under the old Practice Act, the statute provided for recovery of "rents and profits during the detainer." In the case of *Howard v. Valentine*, 20 Cal. 282, decided while the old statute was in effect, the court reversed a judgment allowing recovery for rents accruing prior to the commencement of the period of unlawful detention, and said: ". . . the cases provided for in section thirteen, limits the

recovery of rents to those accruing after the possession of the tenant has become unlawful, and rents prior to that time are not recoverable. . . . The error in this case is that rents are claimed which accrued anterior to the detention, and before the steps had been taken vesting in the plaintiff a right of action." (*Iburg v. Fitch*, 57 Cal. 189.) We have presented, then, the view, illustrated, as we think, both by a consideration of the terms of the statute and the decisions, that the summary proceeding authorized by the code and here adopted by the plaintiff is one which is, as to its prosecution and remedy, within the scope of its application, exclusive and limited. The statute does not authorize the recovery of any money the right to which accrued before the unlawful detention began, except arrears of rents. And this recovery can only be had against the person guilty of such detention, for the main thing sought is the possession of the property. (*Arnold v. Krigbaum*, *supra*.) Defendant Peters, Jr., prior to the accrual of any of the rents alleged to be due plaintiff, had transferred the lease and possession thereunder to defendant Peters Investment Company (this was alleged affirmatively in the complaint and determined in the same way by the findings of fact). The lease in none of its terms prohibited the original lessee from assigning or transferring his rights, but did provide that the obligations of the contract should bind the lessee, his "grantees and assigns." In *Den Lomond Wine Co. v. Sladky*, 141 Cal. 622, [75 Pac. 334], a proceeding similar to this, the court said: "It would seem to require no argument to show that the summary proceedings provided, as the title to the chapter relating to them states, 'for obtaining possession of real property in certain cases,' will not lie against the mere assignee of a lease, who has again assigned and delivered possession to his assignee. . . . It is also entirely immaterial, so far as Sladky (the assignor) is concerned, whether or not he had been guilty of a violation of covenants of the lease. He was not guilty of unlawful detainer in retaining possession of the premises after the breach of covenants, if there was a breach, so long as notice requiring the surrender of possession of the premises was not served upon him (*Schnittger v. Rose*, 139 Cal. 656, [73 Pac. 449]), and, the lease not forbidding an assignment, he certainly had the legal right to assign it and deliver possession of the premises to the assignee, at any time before

service of the notice to quit. . . . Not being guilty of an unlawful detainer, he could not be liable for damages in the summary proceeding provided by statute therefor, for the only damages recoverable in such a proceeding are the damages caused by the unlawful detainer. For such damages as may have been suffered by plaintiff by reason of any breach of the covenants of the lease by Sladky while he was a tenant under the lease and lawfully in possession of the premises thereunder, plaintiff must resort to the ordinary action, and cannot take advantage of the summary proceeding designed solely to enable him to speedily recover possession of the demised premises and put an end to the lease. . . . The statute is so plain and unambiguous that it is unnecessary to cite authorities in support of the proposition that an assignee who has assigned the lease and delivered possession of the demised property to his assignee prior to the service of the notice to quit does not come within its terms."

Considering the first objection urged by the defendants named, in the light of what has been said, we find no difficulty at all in agreeing with appellant Peters, Jr., that he was not a proper party to the action; that as to him, by reason of the facts, a suit in unlawful detainer could not be maintained. The same objection, if considered tenable as a formal criticism of the complaint on the part of the Peters Investment Company, does not show that such defendant has suffered any prejudice by reason of the action of the court in overruling this objection. The Investment Company was the tenant in possession of the property, responsible for the payment of the charges under the lease agreement, and as to it the action could be maintained.

The second objection, that as to the combining of the cause of action for recovery of taxes paid by the lessor with the cause of action for rent and possession, is available to both appellants and should be sustained. The tax charges could not be recovered in an unlawful detainer suit. They could not be classed as damages, for damages could only arise after the retention of possession had become unlawful.

Respondent urges us to apply the provisions of section 41½ of article VI of the constitution as a specific to cure these errors, and argues that no miscarriage of justice can be said to have accompanied the judgment. But, in our opinion, the cloak of the constitution in the particular provision referred

to cannot be made to cover the case. The forms of law provided in the establishment of the different character of actions are substantial, and a party is entitled to insist that he be compelled to answer and submit to judgment only when brought into court in an action properly framed in its particular class. A disregard of this right is more than a mere error "of pleading or procedure," such as is mentioned in the constitutional provision cited.

The findings of fact are quite full, and as to the defendant Peters Investment Company, the tenant holding unlawfully, a new trial will not be necessary, and obviously it will not be necessary to have a new trial in order to give appellant Peters, Jr., the relief to which he is entitled.

The judgment as entered against Peters Investment Company is modified by deducting therefrom the amount shown by the findings of fact to have been awarded on account of taxes paid by the plaintiff. As so modified, the judgment is affirmed, with costs to appellant.

The judgment as to appellant Homer H. Peters, Jr., is reversed and the trial court is directed to enter judgment in favor of said defendant-appellant in accordance with the views herein expressed.

Conrey, P. J., and Works, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 26, 1918.

---

[Civ. No. 1836. Third Appellate District.—May 28, 1918.]

HECTOR WILLIAMSON, Appellant, v. HENRY C. PRATT, Respondent.

**BOUNDARY — CONSTRUCTION OF DEED BY PARTIES — CONSIDERATION BY COURT.**—In determining the location for a boundary line, the construction placed upon a description in a deed, as shown by the acts and conduct of the grantor and his grantees for a long period of time with relation to the line, is entitled to the gravest consideration, unless the terms of the deed are clear and certain to the contrary.

**ID.—DEED—ROAD AS BOUNDARY—PAROL EVIDENCE.**—In an action in ejectment to determine a boundary line, where a deed gave a road as a boundary, but it was not clear what road was intended, it was proper to show by parol evidence the identity of the road.

**ID.—MONUMENTS CONTROLLING OVER COURSES.**—When monuments mentioned in a deed are identified, they control both courses and distances given, whether they were seen by the parties to the deed or not.

**ID.—FIXING OF LINE BY AGREEMENT—ESTOPPEL.**—Where the boundary line between the lands of contiguous owners is doubtful or uncertain and they by parol agreement fix and determine a dividing line between their respective tracts, said line being marked by the erection or maintenance of a fence or other equivalent structure along it, and thereafter the parties hold and occupy their respective lands to the boundary as so agreed on, the accuracy of such boundary line cannot be subsequently questioned by the parties establishing it, or by those claiming under either of them.

**APPEAL** from a judgment of the Superior Court of El Dorado County. N. D. Arnot, Judge.

The facts are stated in the opinion of the court.

Abe Darlington, for Appellant.

H. D. Jerrett, for Respondent.

**BURNETT, J.**—The action is in ejectment, the land in dispute being situated in El Dorado County and consisting of a strip 71.8 feet wide at one end and running to a point 1231.4 feet distant, containing 1.7 acres, of which plaintiff claims to be the owner.

Both parties to the action claim title from Catherine Stornach, who, on the twenty-second day of April, 1901, was the owner of all of a certain tract of land designated as lot 2. On said date she conveyed to her son, Wallace C. McBeath, a portion of said lot 2 described as follows:

“Commencing at the quarter section corner on the north boundary of section one in township 10 north of range 9 east, M. D. M.; thence south 18 chains and 41 links to a post on west side of road; thence north 22 degrees west 19 chains and 95 links to post on east side of road; thence west 7 chains and 50 links to place of beginning, containing 20.86 acres more or less.”

On the 9th of April, 1902, said McBeath and his wife conveyed said land to one Schoenagle, and, on the 27th of August, 1910, said Schoenagle conveyed it to plaintiff, Williamson.

On June 6, 1908, Catherine Stronach conveyed to Catherine A. and Bruce McBeath (another son) another portion of said lot 2, described as follows:

"Situate in section one, township 10 north of range 9 east, Mt. Diablo base and meridian, bounded west by Weber Creek Road, east by the Coloma wagon road; north by the lands of Menardi and south by the lands of C. P. R. R. Co., containing 17 acres more or less."

Subsequently, Catherine A. McBeath conveyed her undivided one-half interest in said land to Bruce McBeath, who, on December 3, 1909, conveyed all his interest therein to defendant, Pratt. The action was commenced March 8, 1915.

The Weber Creek road, referred to in the last-mentioned deeds, was located through lot 2 in 1885 and there has been no change in its location since 1891 or 1892. Defendant has had possession of the disputed tract since acquiring title to it, has kept it fenced, and has cultivated portions of it for three or four years.

C. H. Wildman, county surveyor of El Dorado County, was called as a witness by plaintiff. He described the manner in which he made a survey of the property called for by the deed to plaintiff. He stated that there was on the ground nothing to indicate where the starting point mentioned in the deed was, so he established a quarter-section corner according to the rules of the general land office. From there he ran the west line to the southwest corner. The second call in the deed is, "east 15 chains and 5 links to a post on west side of road." The surveyor stated that he ran this line to a point on the east side of the Weber Creek road, which constitutes the southeast corner of the property in controversy and which is 71.8 feet east of the fence of defendant; that if the stake was set on the west side of the road, "the survey would not close or come anywhere near closing."

It is argued by appellant that the insertion in the description of the word "west" was an error and that it should have been "east." Or, if it was intended as written, it is still west of a road which is approximately 450 feet east of the Weber Creek road.



Respondent, on the other hand, claims that no error was committed and that it was the intention of Catherine Stronach, by the use of the word "road" twice in said description and by the use of the term "Weber Creek Road" in the description in the second deed, to make said Weber Creek road the boundary line between the two properties.

The testimony of the tax collector showed that from 1911 onward the following property was assessed to defendant and the taxes thereon levied paid by him: "Lot 2 of northeast quarter, lot 3 of northwest quarter, less 20.86 acres of Lot 1"; it was stipulated that said 20.86 acres had been assessed to plaintiff and his grantors.

While it may be conceded that the surveyor's testimony is strongly in favor of appellant's contention, and that, if we follow the courses and distances prescribed in the deed to plaintiff, we reach the conclusion that he has the legal title to the property in controversy, yet from a review of the whole record, we are entirely satisfied that the evidence is sufficient to support the finding of the lower court, and that the decision is just and should be upheld.

In the first place, the parol evidence, which was admitted without objection, shows without any conflict that the intention of the original grantor, Mrs. Catherine Stronach, was to make the said Weber Creek road the eastern boundary line of the tract conveyed by her to her son, Wallace C. McBeath. The latter testified: "I owned the land back of the road a short distance, and my mother owned a strip along in front of my land and I wanted a frontage out on the road, and I bought the piece lying between my piece and the county road to get a frontage out on the road, and that is what she described in the deed."

He further stated that a survey was made for the purpose of getting the description to put in the deed, and that the present county road (the Weber Creek road) was there at the time. Furthermore, that what is marked on the map, "approximate course of old road," was not traveled at all in his day.

Again, it is perfectly plain that the parties understood and so interpreted the deed as conveying the land only to said Weber Creek road. This is shown by the fact that the grantee took possession of such tract and no more, and afterward the grantor conveyed the disputed tract to another son; and

fences were built and the land was cultivated and improvements made thereon in accordance with the theory that the Weber road was the boundary line. Moreover, during all the years from 1901 to 1915 no claim was made by anyone that the description in the deeds to plaintiff and to his predecessors in interest covered the land in controversy. Indeed, from the acts and declarations of the parties in interest, there can be no doubt whatever that they understood and intended the deed to convey to said road as was stated by said Wallace C. McBeath. It cannot be doubted that the construction placed upon a description in a deed, as shown by the acts and conduct of the grantor and his grantees, and the manner in which they have exercised their respective rights under their deeds for long periods of time with relation to a boundary line, is entitled to the gravest consideration in the determination by a court of the location of such line. (*Hamm v. City of San Francisco*, 17 Fed. 119; *Truett v. Adams*, 66 Cal. 218, [5 Pac. 96].)

Of course, if the terms of the deed were clear and certain to the contrary, no such significance could be attached to the conduct of the parties. If the description be so definite and accurate as to exclude doubt, it must be applied as found, notwithstanding a different construction may be indicated by the acts and declarations of the parties. But such is not the case here. The deed contains a reference to a natural monument, that is, to a road, and the deed itself does not make it plain what road was intended. It was proper, therefore, to show by parol evidence the identity of this object. In *Colton v. Seavey*, 22 Cal. 497, it was held that "parol evidence is admissible to explain the location of the objects mentioned in the description of a deed, and thus fix the boundary lines of the tract conveyed." The proposition, though, is elemental, and needs no further discussion. It is equally plain that the conduct and declarations of the parties to which we have referred leave no room for doubt that the Weber road was the monument referred to in the deed.

But it is conceded that, if the call in the deed, "thence South 18 chains and 41 links to a post on West side of road," is to be construed as designating a post in the west side of the Weber road, then the deed does not include the land in controversy. The evidence being such that we have a right to read that call as though it read, "thence South 18 chains

and 41 links to a post on West side of Weber road," the familiar question arises as to the relative importance of monuments and of courses and distances in the construction of a deed. The proposition needs only to be stated to suggest an answer. "When monuments mentioned in a deed are identified, they control both courses and distances given, whether they were seen by the parties to the deed or not." (*Anderson v. Richardson*, 92 Cal. 623, [28 Pac. 679].)

This rule is adopted because it is most likely to lead to the discovery of the intent of the parties. (*Piercy v. Crandall*, 34 Cal. 334.)

All authorities on the subject assign courses and distances the lowest scale in evidence as being least reliable. (*Galbraith v. Shasta Inn Co.*, 143 Cal. 94, [76 Pac. 901].)

If we follow this well-established rule we may find, as stated by the county surveyor, that the distances do not correspond with two of the calls in the deed, and that there is a variation in one of the courses, but this is not of commanding importance. We know that such mistakes are quite frequent, and it is no reflection upon the capacity of said witness to suggest the possibility of a mistake in his survey. At any rate, he admits that he found no monument marking the N. W. quarter section corner, which was the initial point of the survey, and that he had to locate it by means of the other corners which were definitely marked. But, assuming that his survey was substantially accurate, we do not know that said corner was similarly located in and by the survey upon which the deed was based.

The one who made the first survey was not called as a witness, but it must be said that there is substantial evidence that his delineation of the tract to be conveyed did not pass east of the Weber Creek road. Bruce McBeath testified that he was present at the time of the earlier survey, and in reply to the question, "Do you remember of this survey crossing the present county road?" he answered, "No, it did not cross it; it came to a stake west of the present county road." It is quite clear that the surveyor could not have located the land as claimed by appellant without going across said road, and the testimony furnishes strong confirmation of the theory that a mistake was made either by him in the earlier survey or by the county surveyor in the later one.

However that may be, we ascertain the controlling monument, and we have no difficulty in shortening the lines and changing slightly one of the courses to make the actual location on the ground correspond with the unquestionable intention of the parties to the deed.

Moreover, conceding, for the sake of argument, that according to the terms of the deed, the location of the eastern boundary line was and is doubtful, we must assume that this uncertainty was known to Catherine Stronach and her sons, and that they all agreed upon the Weber road as the boundary line between the two tracts. While no one has testified definitely to an express agreement to that effect, such would be a fair inference from the conduct of the parties. They established the road as a boundary line, built the fences accordingly, and Pratt's predecessor made improvements upon the disputed tract. And it was not until some seven years after Bruce McBeath had entered into possession of the eastern tract that the established line was questioned by Wallace McBeath's successor in interest. Under such circumstances, it is clear that he is estopped from maintaining the claim that the Weber road is not the boundary line.

In *Loustalot v. McKeel*, 157 Cal. 640, [108 Pac. 710], it is said: "The rule universally sustained by the authorities is that where the boundary line between the lands of contiguous owners is doubtful or uncertain and they by parol agreement fix and determine a dividing line between their respective tracts, said line being marked by the erection or maintenance of a fence or other equivalent structure along it, and thereafter the parties hold and occupy their respective lands to the boundary as so agreed on, the accuracy of such boundary line cannot be subsequently questioned by the parties establishing it, or by those claiming under either of them"; citing cases.

Other circumstances might be mentioned in confirmation of the soundness of the lower court's conclusion, but we deem it unnecessary to go further.

Viewing the whole record, we see no substantial merit in appellant's claim, and the motive for his conduct in the matter was probably not inaptly expressed by the trial judge in the statement: "He wants to *hector* Pratt."

Manifestly, someone has blundered in the survey of the land.

Judge Cooley, in *Diehl v. Zanger*, 39 Mich. 601, said: "Nothing is better understood than that few of our early plats will stand the test of a careful and accurate survey, without disclosing errors. This is as true of government surveys as of any others, and if the lines were now subject to correction on new surveys, the confusion of lines and titles that would follow would cause consternation in many communities. Indeed, the mischief that would follow would simply be incalculable and the visitation of the surveyor might well be set down as a great public calamity."

He proceeds to point out the importance of recognizing the established landmarks in locating lot and boundary lines, and concludes that a good engineer will not overthrow boundaries that have been settled in accordance with the principles of law.

The county surveyor herein, though, may not have been censurable for trying to locate the boundaries in accordance with the courses and distances, as he was probably not in a position to give due consideration and significance to the important circumstances to which we have adverted.

At any rate, we feel satisfied that the judgment should be affirmed, and it is so ordered.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 26, 1918.

---

[Civ. No. 1837. Third Appellate District.—May 28, 1918.]

OSCAR MOORE, Plaintiff and Respondent, v. INDIAN SPRING CHANNEL GOLD MINING COMPANY (a Corporation), et al., Defendants and Respondents; CHARLES MUSHRUSH, Defendant and Appellant.

**WAGE ACT—IMMEDIATE PAYMENT UPON DISCHARGE—PENALTY FOR FAILURE RECOVERABLE BY EMPLOYEE—CONSTITUTIONAL LAW—UNIFORM OPERATION OF GENERAL LAWS PROVISION NOT VIOLATED.**—The act approved May 1, 1911 (Stats. 1911, p. 1268), and the amendment thereof approved April 28, 1915 (Stats. 1915, p. 299), providing

that whenever an employer discharges an employee, wages due and unpaid shall become payable immediately, and imposing a penalty for nonpayment recoverable by the employee, is not violative of article I, section 11, of the constitution, providing all general laws shall have uniform operation.

ID.—PASSAGE OF LOCAL LAW PROVISION NOT VIOLATED.—Such act is not violative of article IV, section 25, subdivision 33, of the constitution, providing the legislature shall not pass local or special laws where a general law can be made applicable.

ID.—DUE PROCESS OF LAW PROVISION NOT VIOLATED.—Such act is not violative of the fourteenth amendment to the federal constitution, providing no state shall deprive any person of life, liberty, or property without due process of law.

APPEAL from a judgment of the Superior Court of Butte County. H. D. Gregory, Judge.

The facts are stated in the opinion of the court.

Carleton Gray, George R. Davis, and William H. Carlin, for Appellant.

W. K. Hays, for Respondent.

CHIPMAN, P. J.—This is an action brought by plaintiff upon his own claim and certain claims assigned to him by his fellow-laborers, for work performed by them as miners.

The court found in favor of the plaintiff on his own and the assigned claims and “that defendant Charles Mushrush promised to pay each of said above-named persons at the rate of three and 50/100 dollars a day wages for eight hours work,” no part of which has “ever been paid to either or any of said named persons.”

The action was to recover not only the wages of the men, but also the penalty as provided by the act entitled, “An act providing for the time of payment of wages,” approved May 1, 1911 (Stats. 1911, p. 1268), and the amendment thereof, approved April 28, 1915, in effect August 8, 1915 (Stats. 1915, p. 299).

The court found, in addition to the sums found due as wages, that there was due each of the several claimants a sum specifically found “as a penalty for nonpayment of wages.” Judgment was accordingly entered in favor of plaintiff and against defendant Mushrush for the sum of \$1,010.55 as wages

and the further sum of \$1,184.15 as a penalty. The findings were in favor of the other defendants. The appeal is from the judgment by defendant Mushrush.

There was no controversy as to the amount due to these several claimants. The only question of fact being tried was whether all of the defendants were liable, and if not all, which of them. The court found as to each claim that the "service was rendered to the defendant Charles Mushrush at his special instance and request."

We have examined the testimony and documentary evidence in the case and are entirely satisfied that the court was justified in finding that defendant Mushrush is liable for the amount of these several claims. The only question open for discussion is the constitutionality of the act of 1911 as amended in 1915, imposing a penalty for nonpayment of the wages, the subject of the action.

Appellant contends that the act of 1911, as it was enacted and as amended, is in violation of section 11, article I, and subdivision 33 of section 25, article IV, of the constitution of this state, and also of the fourteenth amendment to the federal constitution. Section 11, article I, declares that "all laws of a general nature shall have a uniform operation." Section 25, article IV, provides that "the legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: . . . Thirty-third: In all other cases where a general law can be made applicable." Article XIV of the federal constitution provides: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Section 1 of the act of 1911 is as follows: "Whenever an employer discharges an employee, the wages earned and unpaid at the time of such discharge shall become due and payable immediately. When any such employee not having a contract for a definite period quits or resigns his employment the wages earned and unpaid at the time of such quitting or resignation shall become due and payable five days thereafter.

"Sec. 2. All wages other than those mentioned in section 1 of this act earned by any person during any one month shall become due and payable at least once in each month and no

person, firm or corporation for whom such labor has been performed, shall withhold from any such employee any wages so earned or unpaid for a longer period than fifteen days after such wages become due and payable; provided, however, that nothing herein shall in any way limit or interfere with the right of any such employee to accept from any such person, firm or corporation wages earned and unpaid for a shorter period than one month.

"Sec. 3. Any person, firm or corporation who shall violate any of the provisions of this act shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine not to exceed five hundred dollars.

"Sec. 4. None of the provisions of this act shall apply to any county, city and county, incorporated city or town, or other municipal corporation."

The act of 1911 was before the district court of appeal for the first district in the *Matter of Crane*, 26 Cal. App. 22, [145 Pac. 733], and section 3 was held to be violative of section 15 of article I of the constitution, which provides that "no person shall be imprisoned for debt in any civil action, on *mesne* or final process, unless in cases of . . ." The constitutionality of the act otherwise was not considered. Since that decision, and possibly by reason of it, the legislature amended section 3 (Stats. 1915, p. 299) to read in part as follows: "In the event that any employer shall fail to pay, without abatement or deduction, within five days after the same shall become due under the provisions of section one of this act, any wages of any employee who is discharged or who resigns or quits, as in said section one provided, then as a penalty for such nonpayment the wages of such servant or employee shall continue from the due date thereof at the same rate until paid; or until an action therefor shall be commenced; provided, that in no case shall such wages continue for more than thirty days; . . ."

Appellant expresses "difficulty in discovering any material distinction between the two acts. In the act of 1911," continues the brief, "the penalty is nothing more nor less than a fine not exceeding five hundred dollars; while by the amendment of 1915 the penalty is in effect a fine not exceeding thirty times the servant's daily wage." It seems to us that the distinction is obvious in this: the act of 1911 declares that a violation of its provisions is a crime for which the violator is



answerable to the state, while by the amendment he must compensate the wage-earner by way of penalty.

In the present case there was no dispute as to the facts. These laborers had been working for appellant several months at a daily wage, receiving their pay at the end of the month regularly at a time and at a wage agreed upon. The mine shut down at the end of August, 1915, and filled up with water and the laborers were discharged. Appellant, who had theretofore paid them their wages, failed and refused to pay for the month of August, and on September 29, 1915, the action was commenced, thus bringing the case within the terms of the act. No question arises as to the correctness of the amounts due each claimant as to wages earned and the penalty imposed.

The provisions of our constitution, relied upon by appellant, have many times and under many different legislative enactments been before the courts of review in this state, as, also, has the fourteenth amendment of the national constitution. That in certain cases special laws are permissible was shown in *City of Sacramento v. Swanston*, 29 Cal. App. 212, [155 Pac. 101], where the subject was given a somewhat extended treatment, and it was there held that under certain circumstances attorneys' fees were allowable in condemnation proceedings, although in that regard the statute is clearly special legislation. It is doubtless true, as was said in *Bruch v. Colombet*, 104 Cal. 347, [38 Pac. 45], that "no absolute, inflexible rule has ever been formulated, and probably never will be, by which to determine what departure from uniformity is permissible, and what will be fatal. The courts must determine each case as it arises, presuming in favor of the rightful exercise of the legislative power. Yet the inhibition should be enforced unless there is discoverable some reasonable ground for a distinction."

The courts have, however, announced certain governing principles which are more or less applicable to all legislation of this class. Perhaps as concise a statement of the rule as may be found is given in the *Matter of the Application of Miller*, 162 Cal. 687, 698, [124 Pac. 427, 430], as follows: "A law is general and uniform in its operation when it applies equally to all persons embraced within the class to which it is addressed, provided such class is made upon some natural, intrinsic, or constitutional distinction between the persons

composing it and others not embraced in it. It is not general or uniform and it makes an improper discrimination if it confers particular privileges or imposes peculiar restrictions or disabilities upon a class of persons arbitrarily selected from a larger number of persons, all of whom stand in the same relation to the privileges granted or burdens imposed, and between whom and the persons not so favored or burdened no reasonable distinction or substantial difference can be found justifying the inclusion of one and the exclusion of the other from such privileges or burdens. The difference on which the classification is based must be such as, in some reasonable degree, will account for or justify the peculiar legislation."

The act in question, in imposing a penalty where the facts are as therein mentioned, is not unlike, in its operation, the sections of the Code of Civil Procedure—sections 732, 733, 735—which authorize the court to impose treble damages where a tenant commits waste; cuts down trees; and in cases of forcible entry and detainer. The constitutionality of these sections is not questioned. They are held not to be penal, but remedial. (*Jahns v. Nolting*, 29 Cal. 508, 513.) Such laws relate to matters of procedure, as to which the court said, in *Cohen v. Alameda*, 168 Cal. 265, 267, [142 Pac. 885, 886]: "The legislative discretion as to the different modes of procedure or rules of practice to be prescribed for the numerous and various actions and proceedings allowed in courts of justice is very wide, and that its judgment on the question whether or not a particular provision shall be made for any class of cases, and as to the classification thereof, is not to be interfered with except for very grave causes and where it is clear beyond reasonable doubt that no sound reason for the legislative classification, and for the different provisions regarding the same, exists."

The legislative authority in this class of laws is, however, usually referable to the police power, and if the act in question may be regarded as deriving its validity from such source, it is not without its restrictions and limitations. But here, too, as was said in *Western Indemnity Co. v. Pillsbury*, 170 Cal. 686, 694, [151 Pac. 398, 401, 10 N. C. C. A. 1]: "The broad and all-pervading scope of this power makes a satisfactory definition of it impossible." For the purposes of the discussion in that case, Mr. Justice Sloss said: "The police power is, we think, adequately and well described by the

supreme court of Washington in these words: 'By means of it, the legislature exercises a supervision over matters affecting the common weal and enforces the observance by each individual member of society of duties which he owes to others and the community at large. The possession and enjoyment of all rights are subject to this power. Under it, the state may "prescribe regulations promoting the health, peace, morals, education, and good order of the people, and legislate so as to increase the industries of the state, develop its resources and add to its welfare and prosperity." In fine, when reduced to its ultimate and final analysis, the police power is the power to govern.' (*State v. Clausen*, 65 Wash. 156, 177, [37 L. R. A. (N. S.) 466, 117 Pac. 1101].)" But, as was further said by Mr. Justice Sloss: "The arbitrary taking of life, liberty, or property cannot, of course, be justified by referring the act to the police power. But if a given piece of legislation may fairly be regarded as necessary or proper for the protection of furthering of a legitimate public interest, the mere fact that it hampers private action in a matter which had therefore been free from interference is not a sufficient ground for nullifying the act." Examples are pointed out where vital legislative changes are of every-day occurrence. "The same may be said of employer and employees. The employment creates a status involving relative rights and obligations, and it is proper for the legislature, acting within the bounds of fairness and reason, to determine the nature, extent, and application of those rights and obligations."

Referring to the Workmen's Compensation Act, [Stats. 1913, p. 279], the constitutionality of which was under discussion, it was further said: "If the law-making body determines that one of the incidents of that relation shall be that the employer must compensate his employee for an accidental injury received in his service, an enactment to that end is neither arbitrary nor outside the scope of legislative authority." Acts similar to our Employers' Liability Act are in force in several states, and in all of them the law has been upheld against all attack on constitutional grounds. In effect this act makes certain employers liable to pay a stated sum of money to every employee who is injured while in their employ, whether or not the injury arose through the employers' fault. This compensation is based in part upon the wage of the employee and is paid during a period of the employee's

idleness and inability to serve the employer. It would be difficult to find a reason which would justify this law which may not be urged in support of the act in question. There is between the two laws this striking difference: the employers' liability act penalizes the employer though he has committed no fault or wrong. The payment of wages act fixes a penalty for the nonperformance of a duty the employer owes to his employee. It simply says to the employer, "You shall not have the services of your employee without making provision for the payment of his wages within a reasonable time after they are due, and if you default, you shall compensate him for your wrong."

In the case of *International Text Book Co. v. Weissinger*, 160 Ind. 349, [98 Am. St. Rep. 334, 65 L. R. A. 599, 65 N. E. 521], an act of the legislature of Indiana was before the court which provided that "every person employing any person to labor shall make weekly payments for the full amount due for such labor or service in lawful money of the United States to within six days or less of the time of such payment," [Acts 1899, c. 124], and the act also prohibits the assignment of future wages, to become due to employees from persons affected by the act. Weissinger assigned to plaintiff his wages to become due. The action was against Weissinger and his assignee who had accepted the order. It was contended that the act was in violation of the constitution of Indiana and of the fourteenth amendment of the federal constitution. The court said that the act unquestionably restricted the liberty of the citizen to enter into contracts which, in the absence of the statute, he would have the right to make. "Such a prohibition," said the court, "can be sustained only on the ground that some public interest is involved, and that it is of such a character as to render it a legitimate subject of legislative regulation or control. The wages of laborers have been the subject of legislative solicitude and action in this state for many years, and in a great variety of forms." The court instances a number of statutes to support its statement and points out the peculiar circumstances surrounding the day laborer which justify legislation specially designed for his protection. "If," said the court, "the legislature, in the exercise of its general police power, to secure the safety and welfare of the state may deprive the laborer and his employer of the right to contract for payment of wages in anything else than legal tender notes

or other lawful money [referring to decisions of the United States supreme court], we do not perceive why it may not, also, in the exercise of that power, prohibit the assignment of wages before they are earned. . . . The purpose of the legislation in each is to protect a large and important class of citizens from imposition, unfair dealing, and the consequences of their own improvidence. The act . . . is not subject to the objection of a partial or improper classification."

A Kentucky statute [Ky. Stats. 1903, sec. 2739a, subsec. 1] required that all persons, corporations, etc., employing one or more persons in mining work, should within a stated number of days pay in lawful money the full amount of wages due such person or persons, "unless prevented by an unusual casualty." The act declared a violation of its provisions to be a misdemeanor punishable by fine. In *Commonwealth v. Reinecke Coal Min. Co.*, 117 Ky. 885, [79 S. W. 287], defendant was indicted for violation of the act. Among other grounds of demurrer it was contended that the statute "is class legislation, also special legislation, and not a just exercise of the police power," and hence unconstitutional. The court held "that the statute in all its parts is valid."

In volume 9, Federal Statutes Annotated, first edition, at page 462, are cited certain cases bearing upon the question here. In *St. Louis etc. R. R. Co. v. Paul*, 173 U. S. 409, [43 L. Ed. 746, 19 Sup. Ct. Rep. 421], affirming 64 Ark. 83, [62 Am. St. Rep. 154, 37 L. R. A. 504, 40 S. W. 705], it was held that: "A statute entitled 'An act to provide for the protection of servants and employees of railroads,' [Acts Ark. 1889, p. 76], relating to the payment of unpaid wages without abatement or deduction on discharge of an employee, does not amount to deprivation of property, as the act is purely prospective in its operation. It does not interfere with vested rights, or existing contracts, or destroy, or sensibly encroach upon, the right to contract, although it imposes a duty in reference to the payment of wages actually earned, which restricts future contracts in the particular named."

A Rhode Island statute [Laws 1891, c. 918, sec. 1], providing that "every corporation, other than religious, literary, or charitable corporations . . . shall pay weekly the employees engaged in its business the wages earned by them to within nine days of the date of such payment, unless prevented by inevitable casualty," was held valid. (*State v. Brown etc.*

*Mfg. Co.*, 18 R. I. 16, [17 L. R. A. 856, 25 Atl. 246].) See the question considered in *Ex parte Stephan*, 170 Cal. 48, [Ann. Cas. 1916E, 617, 148 Pac. 196]; *Ex parte Lichtenstein*, 67 Cal. 359, [56 Am. Rep. 713, 7 Pac. 728].

There has been a pronounced tendency in state and national legislation for many years, not only to ameliorate the working conditions of the wage-earner, but to safeguard him in his relations to his employer in respect of hours of labor and the compensation to be paid for his labor. In the controversies that have arisen between capital and labor, the public conscience has become awakened to the fact that the public safety and welfare demand more enlightened laws governing the relation of employer and employee—laws which are designed to secure to the latter a reasonable wage, to provide, where practicable, for the enforcement of payment by way of liens on the product of his labor, to exempt from execution a part of his earnings, to give him sanitary and otherwise safe surroundings while employed and the like.

Does the act in question apply equally to all persons embraced within the class to which it is addressed, and is such class made upon some natural, intrinsic, or constitutional distinction? If an affirmative answer may be given, the law is general and uniform in its operation and valid. (*Application of Müller*, 162 Cal. 687, [124 Pac. 427].) The act refers to all wage-earners, designated as employees, as the class referred to, and it unquestionably applies equally to all of the class.

Respondent quotes from an editorial in a responsible journal of January 22, 1916, the "Saturday Evening Post," a statement which we think not far from the truth: "Probably two-thirds of the inhabitants of the United States live out of a pay envelope—that is, on wages or on salaries that are only wages under a polite name. The yearly wage bill of the country has been estimated at fourteen billion dollars, which we take to be conservative." A very large per cent of those persons are day laborers, the greater part of whose earnings are necessarily paid out to them from day to day or week to week in the support of themselves and their families; their requirements are often obtained on credit and must be promptly met or the wage-earner loses his credit and sometimes his job; in many cases, he is denied credit and must pay cash. Delay of payment or loss of wages results in deprivation of the necessities of life, suffering inability to meet just obligations to

others, and, in many cases may make the wage-earner a charge upon the public. It cannot be disputed that the multitudinous and important enterprises which constitute a characteristic feature of the industrial activities around us are absolutely dependent for their successful operation upon the day labor of the wage-earner. Many of these enterprises directly contribute to the welfare of the public and are necessary to the public convenience and safety. It is not to be expected that the laborer upon whose service these industries depend will give his service without assurance of receiving the reward promised for such service, and any law whose object is to give to the laborer some further assurance that he will be promptly paid for his labor, in addition to the employer's promise, would seem to be reasonable, especially as the object is to induce, if not to compel, the employer to keep faith with his employee and imposes a penalty only when he commits a wrong which not only injures the employee but is an injury to the public in its tendency to deprive the public of an incidental benefit which comes from the employee's labor. The law imposes no unreasonable burden upon the employer, for, operating as it does in the future and disturbing no vested right, he must, and it is but fair that he should, make provision to pay his employee before hiring him, failing in which he should pay the penalty. Many enterprises require the services of large numbers of men—the numbers shifting from day to day—some being discharged and others taken on the job. It is common knowledge that a refusal to pay discharged men under such circumstances would tend to create breaches of the peace and disturb the public tranquillity. The intention of the penalty imposed by the act in question is to make it to the interest of the employer to keep faith with his employees and thus avoid injury to them and possible injury to the public at large.

The act very properly provides that when an employee is discharged by his employer, his wages earned and unpaid shall become immediately due. If the employment is not for a definite period and he quits his employment, the act gives the employer five days to pay the wages earned and unpaid. We see nothing unreasonable in this provision, for the right of the employee to quit work, where there is no contract for a definite period, is as undeniable as the right of the employer to discharge his employee.

Respondent cites a very ancient authority not inappropriate: "Thou shalt not oppress an hired servant that is poor and needy, whether he be of thy brethren, or of thy strangers that are in thy land within thy gates.

"At his day shalt thou give him his hire, neither shall the sun go down upon it; for he is poor, and setteth his heart upon it; lest he cry against thee unto the Lord, and it be sin unto thee." (Deuteronomy: xxiv, 15.)

We can discover no ground for holding the act to be violative of any provision of our constitution or that it violated the fourteenth amendment of the national constitution.

The judgment is, therefore, affirmed.

Hart, J., and Burnett, J., concurred.

---

[Civ. No. 1847. Third Appellate District.—May 29, 1918.]

**WOOD & TATUM COMPANY (a Corporation), Respondent,  
v. W. H. BASLER, Appellant.**

**BROKERS' COMMISSIONS—SALE ON DIFFERENT TERMS FROM ORIGINAL AUTHORIZATION—APPROVAL BY OWNER—RIGHT TO COMMISSION.**—Where real estate brokers, acting pursuant to a written authorization to make a sale of real estate upon certain terms, procured purchasers therefor upon somewhat different terms, and the owner accepted the deposit, signed a written approval of sale, and therein promised to pay the brokers the commission named in the authorization, the brokers were entitled to the commission, notwithstanding the sale was never consummated.

**ID.—ABILITY OF PURCHASER—ESTOPPEL.**—Where the owner accepts the purchaser procured by the broker, he is estopped from denying the purchaser's ability or willingness to complete the purchase.

**ID.—ACTION FOR COMMISSIONS—EVIDENCE—OPINION OF PURCHASER'S ATTORNEY—DEFECTS IN TITLE.**—In an action to recover broker's commissions, the written opinion of the purchaser's attorney as to the title is admissible, for the purpose of showing what specifications of supposed infirmities in title were directed to the vendor's attention.

**ID.—DEMAND FOR COMMISSIONS—INTEREST.**—Where the promise to pay a broker's commission is on demand, and the precise time when demand was made does not appear, it will be presumed that it was not made until the last moment before the filing of the complaint, and interest should be computed from that date.



APPEAL from a judgment of the Superior Court of Sacramento County. Z. B. West, Judge Presiding.

The facts are stated in the opinion of the court.

Elliott & Atkinson, and R. Platnauer, for Appellant.

Dunn & Brand, for Respondent.

BURNETT, J.—The action was for the recovery of a broker's commission for the sale of certain real property, and plaintiff had the judgment from which the appeal has been taken.

Plaintiff, being a real estate firm, entered into a written agreement with defendant on December 13, 1911, whereby the former secured an option for the purchase of certain real property, and the next day this was supplemented by another agreement signed by defendant, providing that "in consideration of the services to be rendered and the expense to be incurred by the Wood & Tatum Co., in promoting the sale of the real property hereinafter described, I hereby employ said Wood & Tatum Co. to sell and to have the exclusive right to sell for me all that certain real property," etc. The property and the terms of sale were therein described and in the last clause it provided: "and I agree to allow said Wood & Tatum Co. a commission of five thousand dollars out of the purchase price of said property."

By virtue of these agreements, W. G. Wood, president and manager of plaintiff, endeavored to form a syndicate to purchase the property, and he took three well-known citizens to the property and introduced them to defendant as prospective purchasers with himself. Finally, the four agreed to purchase the land on somewhat different terms from those presented in the original agreement of sale, and a written notification of this was given to defendant by said Wood. As to this, the latter testified: "At the time I served the notification on Mr. Basler I paid him six hundred dollars. Prior to the time of this notification I told him that I was syndicating the property, that I was interesting a number of gentlemen for its purchase. I explained to him that I had these various gentlemen interested, and that I had figured on making them purchasers. I told him the prospective purchasers

were Mr. Mitau, Mr. Snell, Mr. Lindley, and myself. That was before the notification of April 22d."

The written notification appears in the transcript, and to it is attached the following:

"Approval.

"I hereby approve the sale of my property above described and acknowledge receipt of deposit of six hundred dollars and agree upon receipt of the balance of initial installment to convey the same to purchaser with a perfect title, free and clear of incumbrances, except as above.

"I also agree to pay Wood & Tatum Co. on demand a commission of five thousand dollars.

"W. H. BASLER."

It is upon this promise to pay that the action was brought.

We may say, generally, that we find nothing in the proceedings opposed to good conscience or to public policy. Regarding the evidence as we are required under the rule, we conclude that there was no over-reaching, no misrepresentation, no concealment, nor fraudulent conduct in any respect on the part of respondent. We can see no reason why it was not entirely competent for the parties to voluntarily change the terms of sale, as seems to have been done, and we recognize no legal obstacle to the enforcement of the agreement as finally reached. Nor do we think there is any merit in the contention that no consideration exists for the promise to pay the five thousand dollars.

The consideration results from the services performed in securing purchasers for the land upon terms that were agreeable to and ratified by appellant. It is a matter of no consequence that in the beginning somewhat different terms were contemplated. The ratification by appellant of the contract made by respondent was the same in effect as though prior to the performance of the services a similar change in the contract of sale had been agreed upon by plaintiff and defendant. If A authorizes B to sell the former's property for ten thousand dollars and promises to pay him a commission of one thousand dollars, and the latter secures a purchaser for nine thousand five hundred dollars, and A approves the sale and agrees to pay B a commission of nine hundred dollars, could there be any doubt of the sufficiency of the consideration for the promise? Of course, if Basler

had not approved of the change in the terms of sale, it could not be maintained that the agent had earned any commission, but we have no such case.

As to the extent of the services required of an agent to entitle him to his commission, the rule is well settled and no elaboration is called for. We find in the record ample evidence to show that the parties were able, willing, and ready to complete the purchase, and the failure of the consummation of the sale was due to the neglect of appellant to perfect his title. And, it may be added that appellant is estopped from objecting to the qualifications of the proposed purchasers for the reason that the evidence brings the case clearly within the principle announced in 4 R. C. L., p. 309, as follows: "Once the customer procured by the broker is accepted by the employer, the latter is thereafter estopped from denying the purchaser's ability or willingness to complete the contract, inasmuch as he is not bound to accept the offer of such person without a reasonable opportunity to inquire and satisfy himself in relation to it. Consequently his acceptance should estop him from denying anything against this claim except fraud on the part of the broker in inducing the acceptance." (See, also, *Carrington v. Smithers*, 26 Cal. App. 460, [147 Pac. 225].)

As we have seen, plaintiff notified defendant of the sale of the property, and informed him who were the purchasers. These parties were all known to the defendant. Defendant knew that plaintiff was trying to form a syndicate of these parties to take over the land, and he knew at the time of the notification of the sale just what interest in the property each one of these parties was to purchase. With knowledge of these things, defendant accepted the deposit of six hundred dollars, approved of the sale in writing, and promised to pay the said commission of five thousand dollars. He thereby accepted said purchasers upon his own responsibility, and could not thereafter dispute their capacity and disposition to make the purchase.

Some of the rulings of the court are criticized, but they are hardly of sufficient moment to justify specific notice.

We can see no objection to the action of the court in permitting the proposed purchasers to testify that they were able to pay their respective portions of the purchase price of the property. That was a matter, of course, peculiarly

within the knowledge of the witness, and the testimony simply amounted to a statement by the witness that he owned available money to apply to such purpose. There is no practical difference between asking a witness whether he is able to pay one thousand dollars for the property and whether he has one thousand dollars available for such purpose.

If appellant deemed the statement a conclusion or a mere opinion of the witness, it was open for him to test it on cross-examination as to the facts. And, we may add, that this was done with at least some of the parties. The ruling was in line with the case of *Healy v. Visalia R. R. Co.*, 101 Cal. 593, [36 Pac. 125], and other decisions.

An objection is urged because the written opinion of an attorney as to the title of and to the property was received in evidence. But it was the duty of the proposed purchasers, if they desired to require of defendant to convey a perfect title, to call his attention to the defects that he might have an opportunity to correct them. But the purchasers were dependent upon their attorney for such information, and the said opinion was admissible for the purpose of showing what specifications of supposed infirmities were directed to the attention of appellant. It does not explicitly appear that this opinion was read or shown to appellant, but it is a fair inference that his attorney was made acquainted with its contents in order that the proper correction might be made. It is not claimed that said opinion was binding upon appellant, or that the court might not have found, contrary to such opinion, that there was a good title, and, therefore, the proposed purchasers were in default. As to this, however, it may be said, that appellant virtually admitted that a suit was necessary to adjust the matter and that he would have his attorney attend to it. It may be added that no attempt was made to dispute the soundness of said opinion as to the defects in the title, and the case seems to have been tried upon the theory that said imperfections were conceded and that no effort was ever made by appellant to remedy the situation. Indeed, his defense to the action was based upon entirely different grounds.

Some other points are made, but with the exception of one to be noticed, they are without substantial merit.

As we have seen, the promise was to pay five thousand dollars on demand. It would not be due, therefore, until demand was made or suit was brought. There is evidence in the record that a demand was made upon appellant, but the precise time does not appear. It would, therefore, probably be presumed that it was not made until the last moment before the filing of the complaint. (*Trumpler v. Cotton*, 109 Cal. 257, [41 Pac. 1033].)

Hence, interest should have been computed from this date, which was September 24, 1914 (Civ. Code, sec. 1917; *Taber v. Piedmont Heights Building Co.*, 25 Cal. App. 230, [143 Pac. 319].) But the court allowed interest from December 22, 1912. This was error, and the judgment is excessive to the extent of \$614.10.

However, it is not necessary to reverse the judgment on account of this error. It is true that there is no finding of any demand or when the complaint was filed, but it is entirely clear from the transcript that the complaint was filed on said date, to wit, September 24, 1914, and it is a mere matter of computation to determine the amount of the interest from that date.

The judgment is, therefore, modified so as to provide for the recovery of five thousand dollars, and of \$283.90 interest, instead of \$898, and, as thus modified it is affirmed, neither party to recover costs.

Chipman, P. J., and Hart, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on June 28, 1918, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 26, 1918.

[Civ. No. 2193. Second Appellate District.—May 29, 1918.]

**PACIFIC RAILWAYS ADVERTISING COMPANY (a Corporation), Appellant, v. LION CLOTHING COMPANY (a Corporation), Respondent.**

**CONTRACT—STREET RAILWAY ADVERTISING—NONPERFORMANCE—INSUFFICIENCY OF EVIDENCE.**—In this action by a street railway advertising company to recover payments due under an advertising contract, it is held that the evidence is not sufficient to support the finding of nonperformance of the contract.

**APPEAL** from a judgment of the Superior Court of San Diego County. W. A. Sloane, Judge.

The facts are stated in the opinion of the court.

W. P. Cary, for Appellant.

A. J. Morganstern, for Respondent.

**WORKS, J., pro tem.**—The plaintiff and the defendant entered into a written agreement whereby the former bound itself to carry certain advertising matter for the defendant in all cars of certain street and interurban railway lines in and about San Diego, the contract specifically providing that the advertisements should be carried in "end frames in all cars equipped with same." These end spaces for advertising matter are more valuable to advertisers than spaces on the sides of cars, as they come more readily within the range of vision of passengers. The defendant, believing that the plaintiff was committing a breach of the agreement in not giving a proper amount of service in the matter of advertising in the end spaces, gave notice that the contract was at an end and refused to make certain monthly payments provided for in it. The plaintiff sued to recover the amount of these and other installments, judgment went for the defendant, and the plaintiff appeals.

The trial court found that the appellant had not performed its agreement; that, in the month preceding that in which the respondent had attempted to cancel the contract, one of the street-car companies mentioned in it "changed its street-cars, and the new cars put upon said lines contained

no end frames, and therefore no display in end frames of the advertising of this defendant was had"; and that, in the same month in which the cancellation was attempted, "the street-car lines covered by said contract had so changed and altered practically all of their cars that end frames were no longer used therein for the display of advertising matter." The appellant contends that these findings are not supported by the evidence. There was but one witness, the president and manager of the respondent, who was sworn in its behalf. The record shows that on his direct examination he stated that after a certain date, "I think our ad was not displayed in end frames at all"; but on his cross-examination he said upon this question, "If I said that the Lion Clothing Company got no end displays at all after" the date mentioned, "I was mistaken." On his direct examination he also said, referring to a time before the attempted cancellation of the agreement, "In some of the cars with end frames the Lion Clothing Company advertisements were not displayed, although I don't know just how many there were." On being cross-examined upon this particular phase of his testimony, he said: "I can't state when it was that I noticed some cars in which our advertisement was not in the end frames, only it was before the cancellation of the contract. It was probably two dozen times that I saw this, but I'm not positive." This witness was recalled to the stand later and, after examination by counsel as to other matters, made the following statement in response to questions by the court: "A good many times my ad was not in the end spaces. It's very hard for me to give the number of times. It might have been thirty and it might have been fifty." On cross-examination, immediately after this statement, he said, "I might have said twenty-four times a little while ago because I am not certain." This is the only evidence which tends, even in slight degree, to support the general finding of nonperformance. We may at once dispose of the special findings above quoted by the assertion that they show no breach of the agreement, and therefore do not support the judgment. The question remaining, then, is, Does the evidence give substantial support to the finding of nonperformance? The witness is so uncertain in his testimony that he ranges the times when he noted the absence of the respondent's advertising matter in end frames from twenty-four to fifty. He kept, as far as his

testimony shows, no check or account of either dates or car numbers. He says he is unable to tell when he noticed the omissions. The contract was in effect, from the commencement of operations under it to the date of the attempted cancellation, during a period of a little more than two years. If we take even fifty omissions, the greatest number stated by the witness, we cannot fail to note the trifling and insubstantial character of the breach proven. He may have noted the omission on one and the same car once on each of fifty days out of a total of the 730 days going to make up the two years, while the undisputed evidence produced by the appellant shows that eighty-six cars, or thereabouts, equipped with end frames, were in service on the city streets the greater portion of the two years, and that there were never less than fifty such cars in service at any time. When we contemplate a multiplication of the number of cars in service by the 730 days of the two years, that product to be multiplied by the number of trips made by each car over the streets each day—whatever the number may have been, for the record does not disclose it—there is brought home to our minds the worthlessness of the evidence as a substantial support to the finding of nonperformance. If we have regard to the statement of the witness first made, as to the number of omissions of advertisements, that number being 24, we note that it, like the statement of larger numbers, is based on no data whatever. The circumstance that the witness stated these various numbers, taken together with the tone and tenor of his entire testimony, is plainly indicative of the fact that his statement of numbers is based on no definite recollection and does not rise above the dignity of a guess. Upon the evidence in the record the court could not have made the finding of nonperformance of the contract without the aid of an excursion into the realm of conjecture.

There is a question whether the general finding of nonperformance amounts to a finding of fact, or whether it is but the statement of a conclusion of law (9 Cyc. 732, and cases cited); but we merely mention the point in passing, without deciding it, as the judgment is manifestly erroneous upon the ground above discussed.

The judgment is reversed.

Conrey, P. J., and James, J., concurred.



[Civ. No. 1580. Third Appellate District.—May 30, 1918.]

GEORGE W. ELLIS, Respondent, v. CENTRAL CALIFORNIA TRACTION COMPANY (a Corporation), Appellant.

**NEGLIGENCE — COLLISION AT RAILROAD CROSSING — EXCESSIVE SPEED OF TRAIN—QUESTION FOR JURY.**—In an action by a passenger in an auto stage for personal injuries received from a collision with a freight train at a point where the highway crossed the railroad track, the question whether thirty miles an hour was an excessive rate of speed for the train when approaching the crossing was for the jury.

**ID.—SIGNAL OF APPROACH OF TRAIN—QUESTION FOR JURY.**—In such an action, the question whether the train sounded or gave any warning of its approach to the crossing was for the jury.

**ID.—PLEADING—SUFFICIENCY OF COMPLAINT.**—In such an action, the complaint states a cause of action where after alleging that the auto in which plaintiff was riding was a public conveyance, and after describing the crossing, it averred the defendant ran one of its trains across the highway in a negligent manner and at negligent speed, without giving any signals, so that plaintiff, while traveling with due care, was injured.

**ID.—CONTRIBUTORY NEGLIGENCE—PLEADING AND EVIDENCE.**—In an action for personal injuries, contributory negligence is a defense which may be set up, and if set up, must be supported by defendant.

**ID.—OWNERSHIP OF AUTO—IMMATERIAL AVERMENT.**—In such an action, it is not necessary that the complaint should show who was the owner or driver of the auto at the time of the collision.

**ID.—DUE CARE—NEGLIGENT OPERATION OF TRAIN—PROPER ALLEGATIONS.** In such an action, allegations in the complaint that plaintiff was traveling with due care and that defendant ran its train across the crossing in a negligent manner and at negligent speed are not improper, as mere conclusions of law.

**ID.—INJURY TO PASSENGER IN AUTO STAGE—NEGLIGENCE OF DRIVER NOT IMPUTABLE TO PASSENGER—LACK OF CONTROL.**—In such an action, assuming that the driver of the auto stage was negligent, and that his negligence concurring with that of the railroad company brought about the collision and its results, the plaintiff cannot be charged with such negligence, having no authority or control over the driver.

**ID.—CONDUCT OF PASSENGER UPON OBSERVATION OF DANGER—LACK OF NEGLIGENCE.**—In such action, the passenger cannot be charged with negligence because on seeing the approach of the train he jumped from his seat on the side door of the stage into the middle of the car and held on to the front seat.

**ID.—PERSON IN GREAT PERIL—CARE.**—A person in great peril when immediate action is necessary to avoid it is not required to exercise all that presence of mind and carefulness which are justly required of a careful and prudent man under ordinary circumstances.

**ID.—APPROACH OF RAILROAD CROSSING—DUTY OF TRAVELER.**—It is the duty of a traveler on a highway approaching a railroad crossing to use ordinary care in securing a time and place to stop, look, and listen for coming trains, and he is negligent if he merely looks or listens, believing the people in charge of the train will ring the bell or sound the whistle.

**ID.—EVIDENCE—ACTS OF OTHER PASSENGER.**—In such an action, the court properly refused to strike out on defendant's motion the answer given by another passenger that he did not watch or notice other passengers and that he could see those in front of him glancing up and down the track, as the driver did.

**ID.—CONFLICT OF EVIDENCE—PROOF BEYOND PREPONDERANCE—ERRONEOUS INSTRUCTION.**—In such an action, where the evidence is contradictory, an instruction requiring proof beyond the preponderance of the evidence is erroneous.

**ID.—AMOUNT OF VERDICT—INSTRUCTION.**—In such an action, an instruction that if plaintiff was injured as described, the jury should render a verdict for full amount of "damages," not exceeding the amount prayed for, is not erroneous, as an unqualified direction to return a verdict for the full amount.

**APPEAL** from a judgment of the Superior Court of San Joaquin County. D. M. Young, Judge.

The facts are stated in the opinion of the court.

Arthur L. Levinsky, for Appellant.

Stuckenbruck & West, for Respondent.

**HART, J.**—On the twenty-eighth day of September, 1915, plaintiff was a passenger for hire on an automobile stage owned and driven by one Sam Ebel, traveling from Stockton to Lodi, along a public highway known as the "Cherokee Lane." At a point about three miles from Stockton, where the highway crosses the railroad track of defendant, the automobile collided with one of defendant's trains, which consisted of two cars. Plaintiff received injuries in the collision and brought the action to recover damages therefor. A jury returned a verdict in his favor for one thousand seven hundred dollars and judgment was entered against defendant for

that amount, from which judgment defendant prosecutes this appeal.

Briefly stated, the facts are: The crossing where the accident occurred is an exceedingly dangerous one. Going in a northwesterly direction, Cherokee Lane crosses defendant's railroad and immediately turns to the north. There are some trees, with dense foliage, immediately adjoining the right of way, which prevent a full view of the track. It is a place where it should be imperative that the driver of a vehicle should heed the admonition to "stop, look, and listen." The testimony, as well as a number of photographs introduced in evidence, showed that at the crossing there was the usual sign, reading, "Railroad Crossing"; that at a point about one hundred feet south there was a sign painted, "Danger. R. R. X.," and at about thirty feet farther south there was another sign on which was painted the word, "Railroad."

The owner and driver of the auto stage, Sam Ebel, for more than two months prior to the day of the accident, had been running his automobile between Stockton and Lodi, making six round trips each day. The automobile was a seven-passenger, six-cylinder, Pierce-Arrow. On the day of the accident it contained eight passengers besides the driver. The stage left Stockton at about 8 o'clock in the morning, and the collision occurred about fifteen minutes later.

Plaintiff was a stranger to the locality and the trip was his first one over the road, his destination being Lodi. Owing to the crowded condition of the stage, plaintiff sat on the door on the left-hand side with his feet inside of the machine. At a point about seventy-five feet south of the crossing plaintiff saw that they were approaching a railroad track. He testified that he looked up and down the track but could see no train; that the orchard trees grew within six or seven feet of the track at one point and that a train could not be observed until one was within about twenty feet of the track; that when he was about that distance from the track he saw the approaching train coming from the north; that it was traveling at about twenty-five miles an hour and that the automobile was proceeding at not to exceed six or seven miles an hour; that the driver, as quickly as possible, put on his brakes and swerved to the left. Plaintiff jumped to the center of the automobile and took hold of the back of the

front seat, and when he recovered his senses after the collision occurred he was lying on the roadway. He and the physicians who attended him testified as to the extent of his injuries.

One of the passengers, Henry Squires, called as a witness for the plaintiff, testified that when the stage was at a point at about three hundred yards from the crossing he for the first time observed a freight train standing on the siding located about three hundred yards above the crossing; that after that, owing to an obstruction of the view caused by houses and fruit trees, he was unable to see the freight train until the auto stage had reached a point about from twenty-five to forty feet of the track, when he again saw the freight train and that it was then moving and approaching the crossing; that thereupon he immediately warned the driver of the automobile of the approach of the train and that he (the driver) then immediately applied the brakes. Neither Squires nor, for that matter, any of the passengers testifying for the plaintiff heard a whistle blown.

D. McCoy, also a passenger on the auto stage, called as a witness for defendant, testified that he did not know how rapidly the automobile was traveling, but that at one time he said to the driver, "You are going too damn fast"; that when he first saw the train the automobile was going faster than the train was.

The train with which the stage collided had been standing on the siding mentioned waiting for a passenger train to pass. After it passed, the freight train backed out of the siding to the main track and then started toward Stockton. The motorman testified that he blew the crossing signal—two long and two short blasts—twice before reaching the crossing where the accident occurred, the last signal being given when the train was about one hundred feet from the crossing, and ending just before he reached it. The train crew testified that the speed of the train was from ten to fifteen miles an hour and that of the automobile about thirty. There was evidence that there was some wind blowing from a southerly direction and that the automobile was making considerable noise, which tended to explain why none of the occupants of the stage heard the whistle, if one was blown. There is a signal gong at the crossing, but the testimony was that it did not ring at or immediately before the time of the acci-

dent, but that it was covered with a sack to indicate that it was out of order.

There was evidence from which the jury were warranted in finding that the train, when approaching the crossing, was traveling at the rate of at least thirty miles an hour. Whether this was an excessive rate of speed when approaching a public crossing was a question for the jury, as was likewise the question whether the defendant's train sounded or gave any warning of its approach to the crossing.

The appellant complains: 1. That the complaint does not state a cause of action in behalf of the plaintiff and that the order overruling its demurrer thereto was erroneous; 2. That the evidence does not support the verdict; 3. That certain rulings as to the evidence were erroneous; 4. That error was committed in the giving and the refusal to give certain instructions and in the modification of certain instructions proposed by the defendant and given to the jury as modified.

1. The objection to the complaint is without force. That pleading, after alleging that the automobile in which the plaintiff was riding at the time of the accident was a public conveyance, engaged in carrying passengers for hire, and after describing the crossing at which the collision occurred, avers: "That as plaintiff reached said crossing and while plaintiff and said automobile were at and on said crossing, defendant ran one of its trains, drawn by a car operated by electric power, across said highway at said crossing, in a negligent manner and at a great and negligent rate of speed, and without sounding any alarm, bell, or whistle, and without signal or warning of any kind, so that by reason thereof the said train struck plaintiff and said automobile, in which plaintiff was so riding as a passenger, and thereby injured and crushed plaintiff and damaged him in the following manner," etc. It is further alleged that when the accident occurred the plaintiff was "traveling with due care in said automobile." These allegations state a case of negligence. Learned counsel seems to be of the opinion, however, that all the facts and circumstances of the accident should have been set forth in the complaint for the purpose of showing that the plaintiff himself was not guilty of the negligence, if any there was, which was the immediate or direct cause of the damage sustained by him. But this would have necessitated

the pleading of the evidential facts, and no one knows better than the learned attorney for the defendant that thus the very first of the rules of pleading would have been violated. Moreover, contributory negligence in an action to recover for personal injuries is a defense which may be set up, and if so set up must be supported by the defendant. The burden of establishing it, when relied on as a defense, is always on the defendant.

The contention that the complaint should have shown who the owner or the driver of the machine was at the time of the collision is equally untenable. If the plaintiff was himself the owner or the driver of the automobile when the damage was done, either of those facts could have been shown under the claim that his negligence alone was directly responsible for the accident. The complaint, however, alleges, as we have seen, that the machine was run as a common carrier or public conveyance and that the plaintiff was merely a passenger in said machine. This was sufficient to justify the inference that he was neither the owner nor driver of the automobile, assuming, but by no means deciding, that that fact was important as a matter of pleading or necessary to be shown by the complaint.

Another point is that the allegations that the plaintiff "was traveling with due care" and that defendant "ran one of its trains . . . across said crossing in a negligent manner and at a great and negligent rate of speed," involve mere conclusions of law.

Of course, the rule is elementary that conclusions of law are ordinarily not permissible in pleading. But conclusions of fact drawn from the evidential facts involve the statement only of the ultimate facts. In a measure, it is often true that the statement of an ultimate fact involves the statement of a conclusion of law, as, for illustration, the statement in a complaint that "John Doe is indebted to Richard Roe" in a certain sum. This is, in a sense, the statement of a conclusion of law, but it has also always been held to constitute the statement of an ultimate fact—a fact which has been drawn from the evidential facts. So it is true here. The allegations that the plaintiff exercised "due care" in making the crossing and that the defendant ran its train "in a negligent manner and at a great and negligent rate of speed" are, in the last analysis, conclusions of law, but they are

no less conclusions of fact drawn from the facts and circumstances attending the collision, and are, therefore, the ultimate facts to be proved.

2. The jury were apparently justified in finding that the defendant's employees were negligent by failing to blow a whistle or give any other warning of the approach of the train toward the crossing, and was likewise justified in finding that, at the time the train approached and started over the crossing, it was traveling at a greater rate of speed than ordinary prudence would justify when passing over that part of a railroad track crossing a public and popularly used highway. The case, therefore, upon the facts, comes clearly within the doctrines of the cases of *Drouillard v. Southern Pac. Co.*, 36 Cal. App. 447, [172 Pac. 405], and *Ilardi v. Central California Traction Co.*, 36 Cal. App. 488, [172 Pac. 763], both recently decided by this court, and the cases therein cited.

Here, as in those cases, the plaintiff was a passenger in the vehicle which was struck by a railroad train. He was not the driver of the machine, nor the owner, and had no authority or control over the driver. Assuming the driver to have been guilty of negligence, there is no evidence that the plaintiff participated in or was a party to such negligence. There is no evidence that he volunteered advice to the driver as to the course he should follow after the moving freight train hove in sight of the driver and the passengers. In fact, there is no evidence that he did or said anything which contributed in any measure or in any way to any negligence of which the driver might have been guilty.

In the *Ilardi* case, *supra*, it is said: "The cases are quite uniform in the enunciation of the rule that a person riding as a passenger or guest in a vehicle driven by another may not be charged with the latter's negligence which has caused injury to the former, unless the passenger or guest has the right to exercise control over the driver of the vehicle, or 'in the eyes of the law may be said to possess such power of control (*Bryant v. Pacific Elec. Ry. Co.*, 174 Cal. 734, 739, [164 Pac. 385]), or unless it is made to appear that the passenger or guest himself actively participated in the negligence of the driver." (See, in addition to the cases above named, the following: *Pyle v. Clark*, 75 Fed. 644; *Thompson v. Los Angeles & S. D. B. Ry. Co.*, 165 Cal. 748, [134 Pac. 709]; *Wilson v. Puget Sound Co.*, 52 Wash. 522, [132 Am.

St. Rep. 1044, 101 Pac. 50]; *Horne v. Minneapolis etc. R. R. Co.*, 62 Minn. 71, [54 Am. St. Rep. 616, 30 L. R. A. 684, 64 N. W. 102]; *Bresee v. Los Angeles Traction Co.*, 149 Cal. 131, [5 L. R. A. (N. S.) 1059, 85 Pac. 152]; *Fujise v. Los Angeles Ry. Co.*, 12 Cal. App. 207, [107 Pac. 317]; *Parmenter v. McDougall*, 172 Cal. 306, [156 Pac. 460]; *Clarke v. Connecticut Co.*, 83 Conn. 219, [76 Atl. 723]; *Lininger v. San Francisco etc. R. Co.*, 18 Cal. App. 411, [123 Pac. 235]; *Chadbourne v. Springfield St. Ry. Co.*, 199 Mass. 574, [85 N. E. 737].)

Assuming, then, that the driver of the machine was negligent and that his negligence concurring with that of the defendant brought about the collision and its results, the plaintiff cannot be charged with such negligence, but if not entitled to recover must have been shown to have himself failed to exercise ordinary care for his own safety. Such a showing the defendant failed to make.

As is to be observed, none of the passengers heard the train whistle or give any other warning indicating that it was moving, and the first notice the passengers had of its approach was after the trees obstructing a view of the train had been passed and the automobile was at a distance of from twenty-five to forty feet from the crossing. The plaintiff, who was sitting on the door of the machine, with his feet on the inside thereof, upon observing the train moving toward the crossing, immediately jumped to the center of the machine and took hold of the back of the front seat. What induced him to believe, as evidently he did for the moment believe, that he would be less liable to injury in the event of a collision by taking a position in the center of the machine than he would be in the position from which he jumped to the center the record does not show. The probability is that he himself could now give no rational reason for his change of positions in the machine. But that thus he intended and attempted to shield himself against personal injury, the jury had the right to believe; and in the absence of a showing that, under the circumstances of peril which surrounded him and which came upon him with a suddenness that would very naturally preclude the exercise of his best judgment as to what he ought to have done, he was guilty of some affirmative act of negligence, it was entirely for the jury to determine whether he did or did not exercise the care for his own



safety which the law required of him. The verdict implies that he did exercise such care.

It is often true that in cases of sudden circumstances of danger, a person does the very act that he ought not to do to save himself from being injured; but in those cases, where the party causing those circumstances has done so negligently and the injured person has not himself intentionally or from culpable carelessness contributed thereto, the latter will not be held to have been responsible for any injury he may sustain merely because he has not acted prudently or with good judgment in an effort to escape being hurt or killed. As was said, in *Tousley v. Pacific Elec. Ry. Co.*, 166 Cal. 457, [137 Pac. 31], quoting the syllabus: "A person in great peril, when immediate action is necessary to avoid it, is not required to exercise all the presence of mind and carefulness which are justly required of a careful and prudent man under ordinary circumstances." (See, also, *Shearman & Redfield on Negligence*, sec. 89; *Schneider v. Market St. Ry. Co.*, 134 Cal. 490, [66 Pac. 734]; *Stapp v. Madera Canal & Irr. Co.*, 34 Cal. App. 41, [166 Pac. 823].) But we are unable to perceive what the plaintiff could have done to have saved himself from injury. He might have jumped to the ground, it is true, but the peril attending such a move under the circumstances might have been equally as hazardous and dangerous as the course he did pursue. Indeed, it might have then appeared to him more dangerous to jump from the machine while it was moving at a pretty fair speed than to remain in it, for he had the right to suppose that the driver himself, who was familiar with the crossing, having passed over it many times, would exercise due care for the protection and safety of his passengers. In other words, he had the right at all times to trust to the driver of the automobile to avoid the ordinary dangers of the road, with which the driver was entirely familiar, and that even when so near the crossing as the machine was as the train was approaching he would or might take some action which would prevent what then might have appeared and probably did appear to be an impending collision between the train and the machine.

The cases cited by counsel for the appellant have no application to the facts of this case. They might be pertinent to the case of the driver of the automobile if he were plaintiff

here. It should not be necessary to say that in none of them is it held that the negligence of the driver of a vehicle is imputable to a guest or passenger riding in such vehicle where injury has resulted from such negligence to the guest or passenger and where the latter has exercised due care for his own safety.

3. Two of the witnesses to the accident, George Bloodworth and P. S. Titus, were residents of Jacksonville, Florida, and their depositions were taken and introduced in evidence. Before introducing these depositions, counsel for the defendant called a witness, one McCurry, a clerk in the office of the defendant at Stockton, by whom he sought to prove, and did prove, that said witnesses voluntarily went to the office of defendant shortly after the accident and likewise stated to McCurry that they had witnessed the accident and desired to give testimony as to the circumstances thereof. The object of this testimony, as counsel explained it at the trial, was to negative the insinuation which he claimed was involved in the cross-interrogatories submitted to Titus and Bloodworth that they were not in California on the day of the accident. The object thus sought to be attained by the testimony of McCurry was in fact accomplished, he having been permitted to testify that Titus and Bloodworth voluntarily went to him and stated that they saw the accident and wished to give their testimony then, and that he took them to the law offices of defendant's counsel, to whom they made a statement of the facts and circumstances of the accident as they saw it. Further than this the court refused to allow McCurry to testify regarding that circumstance. Counsel now complains that he was entitled to show all the facts and circumstances of the presence of Titus and Bloodworth in Stockton at the time, including details of their conversations concerning the accident. There is no legal support for the objection here made to the court's ruling excluding further testimony as to the matter. All that counsel stated at the trial that he desired to show by McCurry was testified to by said witness. The fact is the depositions themselves showed that Titus and Bloodworth were in California at the time of the accident and witnessed it, and testimony of other witnesses that they were in this state at the time and were where they had an opportunity to see the accident would be admissible only where the other party had introduced proof by way of im-

peachment tending to show that said witnesses were not in California on the day the accident happened.

4. The court refused to strike out on motion of defendant the following answer, given by the witness Stone, a passenger in the automobile when the collision happened, in response to a question by plaintiff's attorney as to whether he (Stone) watched or noticed the other passengers as the train was moving toward the crossing: "Sure not. I was in the back. I could see those in front of me, but naturally looked up and down the tracks, and their heads bobbing, like glancing up and down the track the driver did." The ground of the motion, as stated by counsel, was that "what this witness did or saw is incompetent, irrelevant, and immaterial, the witness not being the plaintiff." It is here urged that the ruling on the motion was erroneous and prejudicial. We cannot see it that way. Obviously, the witness or any witness, whether a party to the action or not, is competent to give testimony as to any fact material and relevant to the issue of which he has obtained direct knowledge—that is, any fact which he has observed or acquired knowledge of through his own perception.

There are numerous other exceptions to rulings as to certain evidence which counsel insists constitute well-taken grounds for a reversal. These we have carefully examined and considered, and in none have we found prejudicial error.

5. The following instruction was requested by the defendant: "It is the duty of a traveler on a highway approaching a railroad crossing to use ordinary care in securing a time and place to stop, look, and listen for coming trains. *He should stop for the purpose of making such observations. It is his duty to use all of his faculties, and it is not enough if he merely looks or listens, believing that the people in charge of any approaching train will ring the bell, or sound the whistle.*" The court modified said instruction by striking therefrom the portion which we have italicized and as so modified read it to the jury. Counsel contends that the court in so modifying the instruction erred to the serious prejudice of the defendant's rights.

That the instruction as proposed contained a correct statement of the rule in the abstract, there can be no doubt (*Griffin v. San Pedro etc. R. R. Co.*, 170 Cal. 772, 775, [L. R. A. 1916A, 842, 151 Pac. 282]); and the portion

of the instruction given sufficiently stated the law of this case. But the instruction as a whole is not altogether applicable to a case of this character. While it was no doubt the duty of the plaintiff to look and listen and "to use all his faculties," to the end that he might exercise the required degree of care to protect himself against injury, it is manifest that he could not stop, since he was in the machine and had no authority over the driver, but was wholly subject to the control and actions of the latter. The modification of the instruction as indicated was not prejudicial, although we cannot perceive that any harm would have been done by giving it in its entirety.

6. Instruction No. 7, proposed by the defendant and disallowed by the court, contained a statement of the rule that the burden of proving the alleged negligence of the defendant as the proximate cause of plaintiff's injuries rested upon the plaintiff. The instruction correctly declared the law, but the rule as stated therein was covered by the court in other portions of its charge. Repeatedly the court told the jury that, to prevail in the trial, the plaintiff was required to prove his allegations of negligence by a preponderance of the evidence, and that unless he did so the defendant would be entitled to a verdict.

7. It is next contended that the action of the court in disallowing the following instruction involved prejudicial error: "The duty of taking added precautions to prevent a collision was not cast upon the motorman . . . by the mere fact that he saw an automobile, but he had the right to assume that the automobile would stop before attempting to cross the track."

The principle stated in said instruction was in effect declared in the following, which was given: "Those in charge of railway cars are not compelled to stop for an automobile approaching a railway crossing where there is nothing to indicate that the person or persons in charge of such automobile are unable to stop before going on such crossing, and nothing to indicate that they have not, or might not have seen the approaching train." Furthermore, the negligence charged against the defendant was in its failure to give a warning signal and in running the train at an excessive speed; and the court explicitly instructed the jury that, in arriving at a verdict, they were to confine themselves to the

consideration only of the negligence charged in the complaint, and that if the negligence so charged was not proved by the plaintiff to the required degree, they should find for the defendant.

8. The court refused to allow an instruction, preferred by the defendant, which, if given, would have told the jury that they could not find for the plaintiff unless the evidence satisfied them that he has proved the negligence relied upon by him "*beyond a preponderance of the evidence.*" It is obvious that the italicized language of the proposed instruction does not correctly state the rule, which is, in civil cases, where the evidence is contradictory, that the decision must be made, not *beyond*, but *according* to the preponderance of the evidence. (Code Civ. Proc., sec. 2061, subd. 5.) It is true that a correct statement of the rule was embraced in the first part of the rejected instruction, but said rule having been elsewhere in the court's charge declared to the jury, it was manifestly unnecessary to repeat it.

9. Defendant's proposed instruction No. 19 would have told the jury that if the evidence showed that the plaintiff saw the "railroad crossing in ample time to have requested the driver of the automobile to stop before attempting to cross the . . . track . . . , and that plaintiff made no remonstrance or objection, but permitted the driver . . . to attempt to cross the . . . track, without stopping, looking and listening for the approach of a train thereon, then . . . the plaintiff is bound by the act of the driver . . . in not stopping, looking, and listening for an approaching train . . . and cannot recover."

The instruction does not state the law applicable to this case. The mere sight of a railroad crossing by a passenger of a vehicle approaching such crossing, where there is then present no apparent danger in making the crossing, does not make it the duty of such passenger to warn the driver of the crossing or of the near approach of the vehicle thereto. As the cases point out, a passenger has the right to assume that the driver will, in such a case, as, indeed, in all cases, exercise due care to avoid the usual or ordinary dangers of the road.

10. Instruction No. 22, requested by the defendant, but disallowed, in effect involved the statement of the proposition that the plaintiff would not be entitled to recover if it ap-

peared from the evidence that he was guilty of negligence which proximately contributed to the injury. The court in its charge clearly stated and explained that rule to the jury, and the rejection of said instruction was, therefore, not prejudicial.

11. There was no error in the action of the court in refusing to give defendant's proposed instruction No. 24. The court, had it adopted said instruction, would have declared to the jury the proposition that they were not at liberty to disregard the testimony of either the motorman or conductor of the train "simply because they were in the employ of the defendant," nor should the jury, for like reason, view the testimony of those witnesses with suspicion. The court instructed the jury that they were the sole judges of the effect and value of the evidence, and, further, that they were not at liberty arbitrarily to reject the testimony of any witness, but should attach to it such weight as in their judgment it was entitled to. This instruction was, of course, addressed to the testimony of all the witnesses testifying in the case, including the conductor and motorman of the defendant's train. There was, therefore, no necessity for or benefit to be derived from an instruction singling out particular witnesses and telling the jury that their testimony should not be arbitrarily or for capricious or unsubstantial reasons rejected or given no weight.

12. The last point made by the defendant to which special consideration should be given involves an attack upon plaintiff's instruction No. 3, which the court submitted to the jury. It is contended that said instruction involves an unqualified direction by the court to the jury to return a verdict for the full amount of damages asked in the complaint, if they found that the plaintiff had received the injuries complained of directly through the negligence of the defendant. We do not so understand the instruction. It in substance stated that if the jury found from the evidence that the plaintiff was injured as described in the complaint and directly through the negligence of the defendant, "then it is your duty to render a verdict in favor of plaintiff and against the Central California Traction Company for the full amount of plaintiff's 'damages,' *not exceeding, however, the amount prayed for in the complaint.*"

The word "damages" as used in the instruction as the same appears in the record before us was without doubt intended as the word "damage," and to mean "damage" and not "damages." As so understood, and as undoubtedly the jury must have understood it from the words immediately following the word "damages," to wit, "not exceeding, however, the amount of damages prayed for in the complaint," the instruction simply and plainly means that, in case the jury found that the plaintiff had been injured through the negligence of defendant or its negligence concurring with that of the driver, the plaintiff would be entitled to full compensation for the *damage* (or injury) so sustained, not exceeding the amount of damages prayed for in the complaint.

We have found no prejudicial error in the record and the judgment is, therefore, affirmed.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 29, 1918.

---

[Civ. No. 2252. Second Appellate District.—May 31, 1918.]

R. D. VANDELINDER, Respondent, v. ANDREW J. ROBERTS et al., Appellants.

**APPEAL—QUESTION OF FACT.**—Appellate courts are not permitted to disturb a judgment where the determination of the facts is the issue presented, except where the evidence to the point is all one way, when the question becomes one of law as to what judgment is indicated therefrom.

**ACTION ON PROMISSORY NOTE—EVIDENCE—MANNER OF PAYMENT—LETTER OF THIRD PARTY INADMISSIBLE.**—In an action on a note indorsed and transferred to plaintiff by defendant in consideration of the transfer to the latter of an option to purchase real property owned by plaintiff and a third party, a letter written by such third party to defendant stating that the note was to be paid from the sale of stock of a corporation to be organized for the disposal of the property was not admissible as against plaintiff, the note being plaintiff's property.

APPEAL from a judgment of the Superior Court of Los Angeles County. W. M. Conley, Judge Presiding.

The facts are stated in the opinion of the court.

Charles S. Darden, for Appellants.

Phil. M. Chandler, for Respondent.

JAMES, J.—Appeal is taken from a judgment in favor of the plaintiff for the principal sum of \$750, the alleged debt being one represented by the promissory note of defendant Andrew J. Roberts, which note was indorsed by the second defendant to the plaintiff. It is alleged in the complaint that the plaintiff and H. L. Hutchinson, in August, 1913, were the owners of an option to purchase certain real property, and that this option was sold and transferred to defendant F. M. Roberts in consideration of the transfer to the plaintiff of the promissory note first mentioned. The defendants set up several defenses, the substance of which is that an arrangement was consummated between plaintiff Vandelinder and F. M. Roberts for the formation of a copartnership to handle the property described in the option agreement, and that the parties mentioned were to form a corporation for the disposal of the property and that a newspaper published by defendant F. M. Roberts was to advertise the land among the negro population. Further, that as a part of the consideration Hutchinson and Vandelinder were to pay debts of F. M. Roberts then existing against his newspaper plant in the sum of \$750, which they did not do; and, further, that it was understood and agreed that the maker of the note here sued upon would not be required to pay the same in money.

The only contention made on behalf of appellants requiring consideration here is that the evidence was insufficient to support the findings and judgment of the court. Unfortunately for appellants, when we consider the transcript of the testimony, we are at once confronted with the fact that there was some substantial testimony to support all of the findings made by the trial judge. As the record reads on the printed page, it does appear that there was a great deal of evidence offered on behalf of defendants which tended strongly to support their defense. Statements made by Hutchinson in the pres-



ence of the defendants, before trial, were corroborative of defendants' claims. However, plaintiff Vandelinder testified positively and directly that he had originally paid five hundred dollars of his own money for the option; that Hutchinson had no real interest therein, and that there was no agreement or understanding waiving payment of the note or making the same conditional. He testified that the option contract was made and delivered to defendant F. M. Roberts. The question here is not whether we would have come to the same conclusion as the trial judge did upon the evidence as it is shown in the transcript. Appellate courts are not permitted to disturb a judgment where the determination of the facts is the issue presented, except where the evidence to the point is all one way; the question then becomes one of law as to what judgment is indicated therefrom.

The point that the court erred in refusing to admit a letter signed by Hutchinson alone, which expressed the condition that out of stock to be issued by the corporation which was to be formed, \$750 worth was to be sold to cover the note to the plaintiff, seems to be without merit. The note sued upon was admittedly indorsed to plaintiff Vandelinder. It was his property; so that any statement made by Hutchinson to defendant F. M. Roberts could not bind the plaintiff. Furthermore, the statement made in this letter was not inconsistent with an understanding that Vandelinder should be paid the face of the note. It seems that the proposed corporation, in aid of which formation the efforts of F. M. Roberts were to be contributed, was never organized.

The judgment is affirmed.

Conrey, P. J., and Works, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 29, 1918.

[Civ. No. 2163. Second Appellate District.—May 31, 1918.]

**FRANK W. WHEELER, Respondent, v. HOUSTON, GORE & LOY (a Corporation), et al., Appellants.**

**ATTORNEY AND CLIENT—JOINT EMPLOYMENT—ACTION FOR SERVICES—**

**EVIDENCE—LIABILITY OF DEFENDANTS.**—Where in an action against two corporations for professional services rendered by plaintiff as an attorney at law the evidence shows a joint employment, and does not show any agreement that the compensation of plaintiff should be divided and paid separately by defendants in proportion to the services to be rendered to them separately, it cannot be contended by one of the defendants that its codefendant ought to pay a larger portion of the fee because of the rendition of more difficult service, since such matter was one for adjustment between defendants, and not a matter with which plaintiff was concerned.

**COSTS—DENIAL OF MOTION TO STRIKE OUT—RECORD—ORDER NOT REVIEW-**

**ABLE.**—Alleged error in denying a motion to strike out a bill of costs is not properly presented where the appellant fails to print in his brief any part of the record containing the order or showing the motion or the grounds thereof.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Charles Wellborn, Judge.

The facts are stated in the opinion of the court.

**J. C. Craig, and Frank S. Adams, for Appellants.**

**Hardy, Wheeler & Hardy, for Respondent.**

**CONREY, P. J.**—This is an action against the appellant and West Coast Engineering Company, a corporation, to recover the sum of five hundred dollars alleged to be due the plaintiff for professional services rendered by plaintiff as an attorney at law. The complaint alleged that the services were reasonably worth six hundred dollars and admitted the payment of one hundred dollars. Defendant Houston, Gore & Loy appeals from the judgment, which was for the sum demanded. Judgment by default was rendered against West Coast Engineering Company.

It is appellant's contention that only a small part of the services detailed by plaintiff were performed for appellant, and that the remaining services were performed by plaintiff

for West Coast Engineering Company and related to matters in which appellant could not, and did not, have any interest. Appellant further claims that there is no evidence by which the court could determine the value of the services actually rendered for appellant.

At the trial appellant conceded that the entire services rendered were worth six hundred dollars, but not that all the services rendered were for appellant. From the testimony as printed in the briefs it appears that at the time of plaintiff's employment there existed a controversy between defendant corporations and the Commonwealth Bonding & Casualty Company concerning contract obligations which the defendants were seeking to enforce against the bonding company. The plaintiff was called to the office of appellant, where he met certain officers of defendant corporations, including appellant's president, Mr. Houston. Thereupon those gentlemen submitted to plaintiff for his examination several documents relating to the matter in hand and stated their case. The plaintiff advised them concerning the matter, and thereafter conducted negotiations which resulted in a settlement of the controversy. At an early stage of those negotiations an agreement was reached as to the amount of money which would be paid by the bonding company to appellant. Further services were thereafter rendered by the plaintiff by which settlement was made between the bonding company and the West Coast Engineering Company, and thus the entire transaction was completed.

The evidence does not show two separate contracts of employment of plaintiff by the defendants. Neither does it show or tend to show any agreement that the compensation of plaintiff should be divided and paid for separately by the defendants in proportion to the services to be rendered to them separately. It was a joint employment for the purposes of the entire transaction. If one part of the services rendered by the plaintiff was more difficult than another and required more labor than another, and if, therefore, the West Coast Engineering Company ought to pay the larger portion of the fee, that is a proper matter for adjustment between the defendants, but it is not a matter with which the plaintiff should be concerned.

Counsel for appellant in their brief further state that the court erred in denying appellant's motion to strike out plain-

tiff's bill of costs. But they do not print in their brief any part of the record concerning the court's order, or showing the motion or the grounds thereof. The subject, therefore, is not properly presented for consideration here. (Code Civ. Proc., sec. 953c; *Barker Bros. v. Joos*, 36 Cal. App. 311, [171 Pac. 1085].)

The judgment is affirmed.

James, J., and Works, J., *pro tem.*, concurred.

---

[Civ. No. 2353. First Appellate District.—June 1, 1918.]

J. R. PRINGLE, Respondent, v. TAGGART ASTON,  
Appellant.

**PROMISSORY NOTE—TIME OF PAYMENT—PAROL EVIDENCE.**—Where a promissory note is by its terms made payable on a certain date, parol evidence is inadmissible in an action on the note to show that it was not to be paid until judgment was recovered in a certain pending action.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. Jas. M. Troutt, Judge.

The facts are stated in the opinion of the court.

Vincent Surr, for Appellant.

J. R. Pringle, *in pro. per.*, for Respondent.

**BEASLY, J., pro tem.**—Pringle sued Aston on a promissory note for three hundred dollars, dated July 17, 1913, and payable thirty days after date. Aston defended, alleging in his answer that he had been employed by Pringle and Richard Hart Keatinge as an engineer, and authorized to secure the services of certain help in his work, whom Pringle and Keatinge were to pay; that he secured the three hundred dollars from Pringle for this purpose, and paid the same to the employees accordingly; that a bank, of which Pringle was the attorney, was a creditor of this partnership between Pringle

and Keatinge, but that the bank did not know of Pringle's connection therewith; that to cover this up and hide Pringle's connection with this partnership from the bank, Aston gave Pringle the note in suit. Aston also filed a cross-complaint in which he averred that he had performed services for the partnership of the value of about three thousand dollars upon a contingent fee, to be derived from the sale of the properties upon which he had performed the engineering services, and that Pringle had without cause thwarted the sale, and thus prevented Aston from securing pay for his services. Pringle answered this cross-complaint, and, after denying its allegations, averred, among other things, that "cross-complainant appealed to plaintiff for financial assistance, alleging actual want and suffering on the part of cross-complainant and of the family of cross-complainant, and cross-complainant did then advise and state to plaintiff that the cross-complainant had a certain cause of action against the Sacramento Valley Electric Railway, and he promised and agreed with plaintiff that in the event that plaintiff rendered to cross-complainant financial assistance he, cross-complainant, would pay the moneys so advanced as and when he recovered on his cause of action against said Sacramento Valley Electric Railway; that thereupon and for no other reason plaintiff made the advance set forth in the complaint on file herein."

The court found against Aston on all the allegations of his answer and cross-complaint; but also found this last quoted and entirely immaterial allegation of Pringle's answer to be true, and that the defendant never recovered any money from the Sacramento Valley Electric Railway prior to the commencement of this action. Defendant's counsel pursuant thereto now asks this court to say that this action was, therefore, prematurely brought.

We cannot see it so. Pringle's allegation as to the promise of Aston to pay when he recovered upon the judgment was nothing more than a statement of the representations of Aston which induced Pringle to lend him the money, and was not, taken in connection with the other findings in the case, a condition precedent to a right of action upon the promissory note. Indeed, to hold that it was so would be to permit this verbal representation to vary the terms of the note as to the date of payment thereof, which we are not prepared to do

in order to save Mr. Aston from paying what is evidently a just debt.

The judgment is affirmed.

Kerrigan, J., and Zook, J., *pro tem.*, concurred.

---

[Civ. No. 2485. First Appellate District.—June 3, 1918.]

LILLIAN FRAME, Petitioner, v. CHARLES E. BARNUM,  
County Auditor, etc., Respondent.

**PUBLIC OFFICERS — COPYISTS IN RECORDER'S OFFICE — COMPENSATION — WORDS ACTUALLY COPIED.**—Copyists in the office of the county recorder are entitled to be paid only for the words actually copied by them into the books of record, and are not entitled to compensation for the words contained in the printed forms in such books.

**ID.—WARRANT FOR CLAIM—PRESENTATION TO SUPERVISORS FOR ALLOWANCE—CONDITION PRECEDENT.**—A claim for compensation for services as copyist in the recorder's office must be presented to and allowed by the board of supervisors before the county auditor is authorized to draw his warrant for its payment.

APPLICATION for a Writ of Mandamus originally made to the District Court of Appeal for the First Appellate District to compel a county auditor to draw his warrant for a claim for services as copyist in the recorder's office.

The facts are stated in the opinion of the court.

Short & Sutherland, and Carl E. Lindsay, for Petitioner.

M. F. McCormick, District Attorney, County of Fresno,  
R. G. Retallick, Deputy District Attorney, County of Fresno,  
W. F. Scherermeyer, District Attorney, County of San Diego,  
Ezra W. Decoto, District Attorney, County of Alameda, and  
A. A. Rogers, Deputy District Attorney of Alameda County,  
for Respondent.

KERRIGAN, J.—This is a proceeding in *mandamus* brought by petitioner, a copyist in the office of the county recorder of Fresno County, against the auditor of that

county, for the purpose of compelling said auditor to draw a warrant upon the county treasurer for the payment of \$599.10, alleged to be due to her as such copyist for her services during the months of February and March, 1918, the amount of said demand being approved by the county recorder. The auditor justifies his refusal to issue the warrant upon two grounds, namely, that in computing the number of folios covered by the demand the copyist had included a large number of words not actually written by her, but which were printed in the books of record in which her work of copying was done; and, second, that the demand of petitioner had not been presented to nor allowed by the board of supervisors of the county.

As to the first of these points, section 4130 of the Political Code (which relates to the duties of the county recorder of Fresno County) provides that the recorder must procure such books for records as the business of his office requires, and that such books may contain printed forms of deeds or other instruments of general use. Elsewhere it is provided that he shall charge and collect ten cents per folio for recording in such books papers presented therefor. In subdivision 3 of section 4234 of said code it is provided that the recorder shall have such copyists as are necessary to perform the duties of the office at a compensation of six cents per folio. In the present case the recorder procured books containing such printed forms; and it is admitted that a large number of the folios contained in the petitioner's demand covered these printed words, the documents upon which petitioner's work was done being written upon one of the standard forms thus carried into the recorder's books. It is the contention of the respondent that the petitioner is only entitled to be paid for the words actually copied by her into the books of record.

It appears in paragraph VI of the petition for the writ that for many years last past the recorder has kept in his office such books containing printed forms of instruments of general use, and that the compensation of copyists in his office has, until the time of the refusal of the respondent to honor petitioner's present demand, been calculated upon the basis of computing the printed matter of these forms as a part of the work copied. This is not denied by the respondent, although he disclaims that he had knowledge of the fact. During the time that this practice has been in vogue the law governing

the office of the county recorder of Fresno County has been amended by the legislature on several occasions; and we think it reasonable to infer that in establishing the rate to be paid to the copyist at six cents per folio the legislature had this practice in mind. To anyone familiar with this kind of work it is apparent that if the legislature had intended that only the words actually written by the copyist in filling in these prepared printed pages should be included in arriving at the amount to be paid therefor, the rate fixed would have been much higher, for the reason that the writing of such insertions must necessarily proceed at a much slower rate than would the writing of an equal number of words where the whole document is copied, the words comprising such insertions being names, dates, quantities, and descriptions—in a word, the most difficult part of the documents and that requiring the most time to copy. Taking a broad view of this question, and bearing in mind that the county recorder is authorized by the same act to charge and collect from the public for recording an instrument nearly twice the rate per folio paid to the copyist for incorporating it into the records, and that in his charge to the public he treats the printed words as written ones, we are of the opinion that the petitioner was correct in computing her demand as she did.

This brings us to the next question, namely, whether such demand should have been presented to the board of supervisors for allowance.

Section 4091 of the Political Code makes it the duty of the county auditor to draw a warrant, (1) in payment of claims that have been legally examined, allowed, and ordered paid by the board of supervisors; (2) in payment of debts and demands against the county where the amounts are fixed by law, and (3) in payment of debts and demands when approved and allowed, and are such as are authorized by law to be allowed by some person or tribunal other than the board of supervisors.

It is not contended by the petitioner that her demand is one that is authorized to be allowed by some person or tribunal other than the board of supervisors; but it is urged that it comes within the category of amounts fixed by law, for the reason, as alleged, that the payments made to copyists are salary or compensation of a county officer, deputy, or assistant. Four cases are cited to the effect that the board of



supervisors has no power to pass upon matters concerning salaries or compensation of such persons. An examination of the cases cited discloses that they have no application to the case at bar. Three of them deal with the question of the constitutionality of enactments, either by the legislature or by the board of supervisors of a county, which purport directly or indirectly to increase the compensation of a county officer during his term; and the fourth, namely, *Agard v. Shaffer*, 141 Cal. 725, [75 Pac. 343], if applicable to this case, would deprive the petitioner of any compensation at all, at least out of the county treasury.

We think it very clear that the compensation payable to a copyist in the recorder's office for work performed during any one month is not fixed by law, but that the law merely establishes a basis or standard by which the amount due may be determined. Such a claim, therefore, must be presented to and allowed by the board of supervisors before the county auditor is authorized to draw a warrant for its payment. This procedure has been held to be compulsory in paying the compensation of an expert employed by the grand jury under section 928 of the Penal Code; in paying for the services of the coroner on the basis of fees fixed by law, or the fees due to a constable. The present case comes within the authority of *Woody v. Peairs*, 35 Cal. App. 553, [170 Pac. 660], where the court had under consideration the question as to whether the auditor of Kern County should draw his warrant in favor of a detective who had been employed by the grand jury of that county, and whose claim had been approved by the foreman and secretary of that body. After referring to sections 4307, 4075, 4076, and 4091 of the Political Code, the court said: "There are, it is true, some cases in which claims against a county may be made upon the order of the judge of the superior court, as in a certain instance we have in mind (Penal Code, sec. 869; *McAllister v. Hamlin*, 83 Cal. 361, [23 Pac. 357]), by a magistrate. These cases, however, are exceptions to the general rule laid down upon the subject by the legislature. In such cases the law expressly confers upon the judge or magistrate the power to order the claims to be paid. . . . But, unless there is some provision of law expressly authorizing a different course of procedure, all claims or charges against a county must be presented and filed and approved and allowed as provided by the sections of the

Political Code above named, in which cases only is the auditor required to interpose his official approval as a prerequisite to the payment thereof by the treasurer."

For the foregoing reasons the writ is discharged.

Zook, J., *pro tem.*, and Beasley, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 2, 1918, and the following opinion by Angellotti, C. J., Shaw, J., and Wilbur, J., then rendered thereon:

ANGELLOTTI, C. J.—While all of the justices of this court concur in the judgment of the district court of appeal discharging the writ of mandate, and in what is said in the opinion as to the necessity of presenting such a claim as that of petitioner to the board of supervisors for allowance, we are not in accord with the views of that court upon the first question discussed in the opinion. To the contrary, we are clearly satisfied that the contention of respondent that petitioner is entitled to be paid only for the words actually copied by her into the books of record is well based.

Shaw, J., and Wilbur, J., concurred.

---

[Civ. No. 1771. Third Appellate District.—June 3, 1918.]

THE PEOPLE, Respondent, v. CHAS. F. DILLMAN et al.,  
as Trustees, etc., Appellants.

NUISANCE—ABATEMENT UNDER RED-LIGHT ACT—DISMISSAL OF PROCEEDING.—In an action to enjoin the use of property for immoral purposes under the Red-light Abatement Act, where it is shown that the nuisance had been abated before the action was commenced, the proceeding will be dismissed.

ID.—EVIDENCE—EXPLANATION OF VISITOR—TESTIMONY OF POLICE OFFICERS—HEARSAY.—In such an action, testimony of police officers, who raided the premises, that a man found in the room of an inmate of the house had told them that he was there for an immoral purpose was hearsay and inadmissible.

**ID.—IMPROPER CORROBORATION.**—In such an action, it is not proper to corroborate the testimony of a police officer, by permitting another officer to testify that he had heard the testimony and that it was true in all particulars.

**ID.—DECREE ENJOINING USE OF PROPERTY FOR IMMORAL PURPOSES — TITLE NOT CLOUDED.**—A decree under the Red-light Abatement Act enjoining defendants from using certain real property for immoral purposes, but not closing the premises or ordering the sale of furniture or taxing costs, is not prejudicial, as clouding the title to the property.

**APPEAL** from a judgment of the Superior Court of Sacramento County. Peter J. Shields, Judge.

The facts are stated in the opinion of the court.

White, Miller, Needham & Harber, for Appellants.

Hugh B. Bradford, for Respondent.

**HART, J.**—The action was commenced on July 13, 1917, by the district attorney of the county of Sacramento to secure an injunction enjoining the use of certain real property in the city of Sacramento belonging to appellant, Marguerite Home, for immoral purposes under the so-called "Red-light Abatement Act." (Stats. 1913, p. 20.) A trial was had and the court found that on and prior to July 8, 1917, the building referred to was used for the purposes of lewdness, assignation, and prostitution, and was a nuisance. Judgment was entered that appellants "do perpetually and absolutely desist and refrain from conducting and maintaining and using, for the purposes of lewdness, assignation, and prostitution," said premises. The appeal is from said judgment.

The facts are: The building, which the petition alleges was used for purposes of assignation and prostitution, is situated in the city of Sacramento and is the property of the "Marguerite Home," an institution founded and maintained for the care and support of aged women, and of which the appellants Dillman and Mebius are trustees. On the ninth day of March, 1916, the trustees leased said premises for the term of three years, beginning on said date, to one Peter Gilarducci, said lease being evidenced by an instrument in writing, duly executed by the parties thereto. Among the provisions of the

lease is one to the effect that the lessee shall not let or underlet the whole or any part of said premises without the written consent of the lessors. Some time after the execution of said lease, Gilarducci, with the consent of the trustees, sublet the building to two men by the names, respectively, of Valentina and Gabriella. It appears, however, that, on the sixteenth day of November, 1916, Gilarducci, without the consent or knowledge of the lessors, sublet the upper floor of the building to one Joe Caci. This sublease was in writing and referred to the building as a "lodging-house." The lower floor of the building was used as a saloon by Valentina and Gabriella.

On the eighth day of July, 1917, the portion of the premises so sublet to Caci was raided by the police, who found in one of the rooms thereof a woman named and known to the police as Kitty Gray, who was also known by the officers to be a prostitute. The officers thereupon placed the woman under arrest. She was the only female found by the officers in the building on that occasion. On the thirteenth day of July, 1917, five days subsequently to the raid above referred to, this action was begun by the district attorney of Sacramento County under the act of the legislature above mentioned, which is popularly known as the "Red-light Abatement Act."

Upon the close of the case of the people the defendants asked for a nonsuit on the ground that the evidence was insufficient to make out a case under the act in question. The court denied this motion, and here the appellants complain: 1. That the evidence does not support the findings; 2. That, conceding that, on the eighth day of July, 1917, the time at which the raid was made and the said Kitty Gray put under arrest, the premises were used for the purposes of prostitution, and thus a nuisance therein maintained, the evidence clearly and unquestionably shows that such nuisance was abated by the tenants, Valentina and Gabriella, themselves, and that, therefore, at the time this proceeding was instituted, there existed in and on the premises no nuisance to abate; 3. That the trial court made certain erroneous rulings respecting the evidence from which serious detriment to the rights of the defendants in the trial resulted.

The testimony introduced by the people was given by the police officers who raided the premises on the eighth day of July, 1917, and in substance is as follows: That, on going to the upper floor of the building, they met the woman, Kitty,

Gray, just as she was emerging into the hallway from her room. Asked by the officers whether there was anyone in her room, she replied in the negative, but they proceeded on into her room and therein found a man who was in the act of pulling his pantaloons from his lower limbs to his waist. This man, whose name was not given, stated that he had only a moment previously given the woman some money upon an agreement that she would have sexual intercourse with him, but declared that up to that time no sexual relations between them had been had. One of the officers testified that, at some time before the eighth day of July, the premises had been raided by the police and the place closed. At that time there were three or four women of bad repute in the building, one of whom was Kitty Gray, who was then cautioned by the officers against resuming in Sacramento her occupation as a prostitute. The same officer (and the only officer who so testified) said that the general reputation of the premises prior to and on the eighth day of July was that it was a house of prostitution. Each of the officers testified that he did not know, nor had he heard, of any acts of lewdness or prostitution being committed in said building after the said eighth day of July, and that so far as he knew no such acts had been committed in the building after that date.

The foregoing embraces a synoptical statement of all the testimony presented by the people in support of the charge set out in the petition.

The defendant, Dillman, testifying for the defense, testified that he did not know Caci had been given a sublease of the upper portion of the building by Gilarducci until after the Gray woman was arrested on the eighth day of July; that the sublease to Caci was made without the consent of the trustees of the Marguerite Home; that, upon learning of the raid by the officers on the eighth day of July, Valentina and Gabriella dispossessed and put out of the premises the said Caci; that, so far as he knew, there had been no prostitution or lewdness practiced in the building since the said eighth day of July.

The court found that on and for some time prior to the eighth day of July, 1917, the premises in question were used for the purposes of lewdness, assignation, and prostitution, and that said building was a nuisance under the laws of this state. The judgment thereupon entered decrees that the defendant, and their agents, etc., "do perpetually and abso-

lutely desist and refrain from conducting and maintaining and using, for the purposes of lewdness, assignation, and prostitution," the said premises.

It is plainly apparent from the evidence that the trustees of the Marguerite Home were entirely ignorant at all times of the immoral use to which the upper portion of the building was put by the sublessee, Caci, and we think it is very clear that had they known that Caci or any other person was using the building for the purpose of carrying on the immoral traffic which appears to have been practiced in said building, the trustees would promptly have evicted the transgressor and have stopped the illicit business. But we are further of the opinion that the evidence is sufficient to support the decision of the trial court.

It may be observed that it must be true, as counsel for the appellants contend, that where a nuisance has been abated before action to abate it has commenced and it does not exist at that time, the trial of the action will be without a foundation for its support and utterly barren of substantial results, for in such case, obviously, there would be no nuisance to abate. And if there had been evidence sufficient to support a finding that the nuisance had been abated before this action was commenced, we doubt not that the court below would have dismissed the proceeding or found against the averments of the petition.

It is true that one of the trustees testified that upon learning of the raiding of the building by the officers and of the discovery that prostitution was going on therein, on the eighth day of July, 1917, Valentina & Gabriella, subtenants of the building by consent of the trustees, immediately put Caci out of the possession of the upper story of the building and thus stopped further prostitution therein. It was further made to appear that, so far as the officers or trustees knew or were advised, prostitution or other acts of lewdness were not practiced in the building after said date. But, while this is all true, there is by the law committed to trial courts, upon the question of the weight or evidentiary value of testimony, a very large discretion, with which interference by courts of appeal is never justified or justifiable unless upon the face of the testimony itself as necessarily it must be presented to the latter courts it may be said to be unworthy of belief or entitled to no weight. In this case, however, the trial judge was not

required to, and most probably did not, disbelieve or discredit the testimony of the appellants who testified to the suppression of the nuisance by the subtenants, Valentina & Gabriella, on the 8th of July, upon learning of its maintenance upon the premises. There was testimony, as we have shown, which tended to establish the fact that prostitution had been carried on in the building prior to and on the eighth day of July. There was no testimony affirmatively showing that prostitution had not been practiced in the building after the eighth day of July. The showing on that question was of a negative character—that is to say, it consisted of statements of witnesses, who had not been about the premises after the eighth day of July, that they had no information that the illicit business had been prosecuted in the building after that date. So upon the question whether the building was used for the purposes of prostitution and assignation at all times down to the filing of the complaint, there was before the trial judge positive proof of circumstances from which the fact might justly be inferred, which proof was negatived only by testimony of a very indefinite, vague, and unsatisfactory nature. Hundreds, no doubt thousands, of witnesses could be produced who would testify that they had no knowledge, either from direct or indirect sources, of the existence or maintenance of immoral practices in the building either before or after the eighth day of July, 1917.

Two only of the several rulings as to the evidence complained of by the appellants were erroneous, but they were manifestly without prejudice to the rights of the appellants. The first of these was the ruling permitting the police officers to testify that the man they found in the Gray woman's room at the time of the raid had told them that he was there for the purpose of having sexual relations with the woman and had paid her for the service, without receiving the same. This testimony was plainly hearsay and inadmissible.

In this connection, we may, in view of the many cases arising and which will probably in the future arise under the Abatement Act, make these observations: That, while considerable latitude is allowed (and allowable) the people in the proof of a case arising under said act, there is no legal justification for a radical departure from the long-established rules of evidence to establish such a case. The act itself expressly provides that testimony of the general reputation of the place

against which the action is brought—a species of hearsay testimony, quite essential, it is true, in most cases under that act and in some otherwise arising—may be received. But, however laudable the purposes of the act may be, no more in a case instituted under the provisions thereof than in any other class of cases should the established rules of evidence be relaxed. Indeed, a trial court, it seems to us, should be specially careful in the trial of such a case, for under said act the personal property of the person charged with keeping a place prohibited thereby may be confiscated and sold, and the right of the owner of the premises against which the action is directed (the action being one *in rem* as well as *in personam*) to use the same for the period of one year may be foreclosed, thus depriving the owner of the income which may be derived from the property. Hence, while the people should not be unduly hampered in a proper effort to suppress the social evil which the act was designed to eradicate, and should be accorded in the trial full legal opportunity to do so, the rules of evidence long established and the wisdom and the efficacy of which for eliciting the truth in forensic controversies involving disputed questions of fact have been well confirmed by the test of long experience, should not be twisted or distorted or departed from merely for the achievement of some special end. These observations have no application to the present case, which, generally, appears to have been well and fairly tried, but are made merely with the view of emphasizing the important proposition that neither in a case under the Abatement Act, whose penalties are indeed severe, nor in a case under any other act, should a citizen's rights be so lightly treated or regarded as that he may be deprived of them by a failure to recognize and apply those substantial forms of procedural law which are intended to protect alike the rights of individuals and those of the public.

In the present case, however, the declarations of the man referred to could not have prejudiced the rights of the appellants, since there was other testimony (his presence in the room in a semi-nude condition with a known prostitute) which appears to have been sufficient conclusively to establish the immoral purpose for which he was in the room, a circumstance strongly supporting the charge that the place was being used for the purposes of prostitution. His explanation of the reason for which he was in the woman's room, therefore, was un-



necessary to be shown to prove the circumstance to which it related.

The second ruling was in allowing one of the police officers called as a witness for the people to testify that he had heard the testimony of the witness who had just preceded him on the stand and that "it was correct" or true in all particulars. Of course, such a method of corroborating a witness is not proper. A witness should be examined as to the facts of which he has knowledge, and so give the adversary party an opportunity to cross-examine him and thus test the accuracy of his knowledge of the facts to which he testifies and his memory, etc. But there was so much testimony to the same point that the method adopted was not prejudicial.

We have now examined and disposed of all the important points to which our attention has been directed by counsel. We may well add, however, that the decree itself is without prejudice to the appellants.

There was not made, as a part of the judgment, an order, which may be made under the provisions of section 7 of the Abatement Act, directing "the removal from the building or place of fixtures, musical instruments and movable property used in conducting, maintaining, aiding or abetting the nuisance, and directing the sale thereof," or an order directing the closing of the building or place against its use for any purpose and so keeping it closed for the period of one year, etc.

It will be observed that the decree goes no further than to perpetually enjoin the defendants from allowing the building in question to be used for the purposes of prostitution or lewdness of any kind or character. In other words, the effect of the decree is merely to prevent the defendants from using the building as a place for the commission of unlawful acts, or, expressing the proposition in another form of language, the effect of the decree is only to require the defendants to obey a legislative mandate, viz., not to use their property or permit it to be used for the purposes of prostitution or other like acts of immorality. It adjudges nothing as against the defendants which is not a duty, *per se*, resting upon all the people of the state—a duty which the defendants, trustees, unquestionably desire and intend, and have always desired and intended, to respect and at all times religiously adhere to. Very properly, since it is apparent that the appellants at no time had any actual knowledge of the existence and maintenance of the

nuisance complained of on their premises, the decree does not contain a provision or an adjudication that the appellants shall pay any of the costs of this proceeding. (*People v. Barbieri*, 33 Cal. App. 770, [166 Pac. 812].) There is, therefore, imposed by the decree upon the appellants no penalty in the way of costs.

The claim that the effect of the decree is to cloud the title of the appellants to the property is clearly devoid of merit. It is as obvious as any proposition can be that a judgment the only effect of which is merely to enjoin the use of real property for unlawful purposes cannot operate to put a cloud upon the title to such property. Such an adjudication might affect the reputation of the property upon which it directly acts and so cause the depreciation to some extent of the value of the property for renting or even selling purposes, but most certainly in no conceivable way can it have the effect of disparaging or affecting in the slightest way the title of the owners.

We have found no just reason for disturbing the decree, and it is accordingly affirmed.

Chipman, P. J., and Burnett, J., concurred.

---

[Civ. No. 1812. Third Appellate District.—June 3, 1918.]

**THIEL DETECTIVE COMPANY (a Corporation),**  
Respondent, v. **COUNTY OF TUOLUMNE,** Appellant.

**PUBLIC OFFICERS—DISTRICT ATTORNEY—AUTHORITY TO EMPLOY DETECTIVES.**—Under section 4307, subdivision 2, of the Political Code, a district attorney is authorized to employ detectives at the expense of the county, when necessary for the detection of persons guilty of crimes or to obtain evidence of their guilt.

**ID.—COMPENSATION FOR DETECTIVE SERVICES—PRESENTATION OF CLAIM—PROCEDURE UPON REJECTION.**—A claim for detective services performed by a county at the request of the district attorney must be presented to the board of supervisors, and if it be rejected, the claimant may bring his action as provided by section 4078 of the Political Code.

**ID.—CLAIMS AGAINST COUNTIES—ACTION BY BOARDS OF SUPERVISORS—WHEN NOT FINAL.**—Where a claim has been allowed in full by the

board of supervisors, if it be within the jurisdiction of such tribunal, it can only be attacked by a suit in equity on the ground of fraud. If it be apparent that the board has exceeded its jurisdiction in the allowance of the claim, the order may be nullified through an action brought in court, or such order may be disregarded and treated as nugatory by any officer who is called upon to give effect to the invalid determination of the board. If, however, a claim within the power of the board to allow has been rejected, or allowed only in part, the decision of the board is not final, but by virtue of the statute the claimant may bring his action at law and establish his claim against the county as fully and effectively as it could be by a favorable order of the board in the first instance.

**APPEAL** from a judgment of the Superior Court of Tuolumne County. G. W. Nicol, Judge.

The facts are stated in the opinion of the court.

C. M. Delameter, Frank W. Street, and Horace M. Street, for Appellant.

Henry G. W. Dinkelspiel, and Frank W. Hooper, for Respondent.

**BURNETT, J.**—The appeal is from the judgment in favor of respondent for detective services performed for the county by virtue of an agreement with the district attorney. The claim was properly presented to the board of supervisors, and by said board it was rejected. Thereafter, within the statutory period, an action was brought in the superior court, and by said court it was found that plaintiff was employed by the district attorney of the county "to make certain investigations and secure evidence concerning the alleged violations of certain of the criminal laws of the state," that certain services were performed in pursuance of this employment at an agreed compensation, that in the performance of said services, plaintiff incurred certain expenses incidental to said investigation, that the charges for the same, together with said expense, were reasonable, that they were necessarily incurred in the course of said employment, were a proper charge against the county, and that a claim therefor properly verified was filed with the clerk of the board of supervisors, and thereafter rejected by said board.

There is no question of the authority of the district attorney to incur an expense of this character. Subdivision 2 of section 4307 of the Political Code provides that "the traveling and other personal expenses of the district attorney, incurred in criminal cases arising in the county, . . . and all other expenses necessarily incurred by him in the detection of crime and prosecution of criminal cases," are county charges. That this includes the services of detectives in proper cases is not disputed. He may employ them at the expense of the county when necessary for the detection of persons guilty of crimes or to obtain evidence of their guilt. (*Rocca v. Boyle*, 166 Cal. 94, [Ann. Cas. 1915B, 857, 135 Pac. 34].)

The compensation therefor being a county charge, the claim must be presented to the board of supervisors, as it is the duty of this tribunal "to examine, settle, and allow all accounts legally chargeable against the county," etc. (Pol. Code, subd. 12, sec. 4041; *Rocca v. Boyle*, *supra*.)

Such claim stands upon the same footing as other charges that must be presented to the board of supervisors, and if it be rejected, the claimant may bring his action in court as provided by section 4078 of said code. In that respect the statute makes no distinction between different claims, and the courts are not justified in making any. It is true, as said in *Fulkerth v. County of Stanislaus*, 67 Cal. 336, [7 Pac. 754], that said provision is general and "applies to all accounts presented against the county." In the *Fulkerth* case, the sheriff of the county brought suit to recover compensation for meals furnished to prisoners in the county jail, and it was held that it was for the board of supervisors to determine in the first instance what was a reasonable compensation, but that the determination by said board was no more final than would have been a similar finding in an account for any other proper county charge.

So, herein, it was the province and duty of the board of supervisors to determine whether the services were performed by claimant, whether they were authorized by the district attorney, whether they were necessarily incurred in pursuance of his duty as public prosecutor, and whether the demand was reasonable in amount. But when the claim was rejected, the foregoing considerations all became the subject of cognizance and determination in an action brought in the superior court. To hold otherwise would be to nullify the

plain provision of the statute and to oppose the decisions of the supreme court. Of course, if the decision of the board is final, that is an end of the matter, and the remedy by an action at law is not available. But the truth is that such contract rights as well as "vested rights of property" are placed by the constitution and statutes "under the protection of the courts" where the questions of law and fact may be finally determined. (*Glide v. Superior Court*, 147 Cal. 30, [81 Pac. 225].)

Appellant, in its contention that the determination of the board of supervisors is final and conclusive, has been misled by certain expressions used by the appellate courts in cases wherein claims had been allowed in full by the board of supervisors. In such instance, the situation is quite different from this, as must be apparent.

To illustrate the distinction, we may refer to some of the leading decisions in this state wherein it was sought to review the action of the board of supervisors in allowing the claim.

In *Colusa County v. De Jarnett*, 55 Cal. 373, the action was brought to restrain the defendant as county auditor from issuing a warrant in favor of one Dyas upon a claim in his favor, which had been allowed against the county for legal services rendered by him for said county. The supreme court held that there was nothing in the complaint to authorize the interposition of a court of equity. Hence, it was plain that the court would not be justified in restraining the auditor, who is a mere ministerial officer, from issuing his warrant upon a claim which had been adjudged by the proper tribunal, the claim being valid upon its face and within the scope of the statutory authority of the board of supervisors.

*McFarland v. McCowen*, 98 Cal. 329, [33 Pac. 113], is a similar case. The claims therein were for constable fees and were allowed by the board of supervisors. The auditor refused to draw his warrant for their payment, and the supreme court declared that "it is the privilege and duty of the auditor to refuse to draw his warrants upon the treasurer for claims, which, although sanctioned and ordered paid by the board of supervisors, are void upon their face for want of jurisdiction in the board of supervisors, or showing an excess of jurisdiction, or other plain and palpable violation of law."

In the absence of any such showing, it was held that the decision of the board was conclusive, since "there should be an end of litigation in every case, and when a case has once been heard upon its merits and fully determined, it should be held conclusive until reversed, modified, or set aside in the mode prescribed by law."

In the case of *McBride v. Newlin*, 129 Cal. 36, [61 Pac. 577], the action was brought by a taxpayer to enjoin the board of supervisors from allowing an illegal claim against the county for printing, and also to enjoin the auditor and treasurer from acting officially upon such claim. The following statement made therein is manifestly true: "The board of supervisors, being the body clothed with quasi-judicial functions, is the appropriate tribunal to pass upon the claim which it is alleged will be allowed. We must presume that the board will do its duty, and if the claim is illegal, that it will be rejected."

In *County of Santa Cruz v. McPherson*, 133 Cal. 282, [65 Pac. 574], the action was to recover money from the defendants, to whom it was paid by reason of the allowance by the board of supervisors of the claim of the former against the county for printing. It was held that the action of the board was a conclusive adjudication of the claim, since it was of a subject matter within its jurisdiction. The action was sought to be justified by virtue of section 8 of the County Government Act (Stats. 1893, p. 347), authorizing and directing the district attorney to institute suit for the recovery of money paid out "without authority of law."

Such claims being, however, within the range of legal county charges, the validity of the alleged indebtedness could not be retried in said suit, and the determination of the board of supervisors manifestly constituted the "authority of law."

*County of Alameda v. Evers*, 136 Cal. 132, [68 Pac. 475], was a somewhat similar case, and it was held that the action involved a collateral attack upon the order of the board of supervisors and that: "From the decision of the board of supervisors on questions of fact in regard to matters of which it had jurisdiction, there is no appeal. If the board exceeds its jurisdiction or allows claims which are illegal upon their face, or in direct violation of law, there is a remedy."

*County of Yolo v. Joyce*, 156 Cal. 429, [105 Pac. 125], was in principle the same as the last two foregoing citations,

and it was held that the action of the board in allowing the claim could not be reviewed in that proceeding.

The contention of appellant herein that the district attorney should consult the board of supervisors before incurring such expense was virtually answered in said decision as follows: "There is no provision of the law which requires the district attorney to consult any court or obtain any order therefrom as a prerequisite for his incurring any expense which he may deem proper in the discharge of his duties in detecting crime or prosecuting criminal cases." It may be said, also, that there is no provision requiring him to consult the board of supervisors, but the matter is left to his discretion in the first instance. It is true that in the *Joyce* case it was declared that his discretion is ultimately to be reviewed by the board of supervisors alone, and when that body determines that the discretion has been properly exercised, that the expense was necessarily incurred by him and the charges fair and reasonable, "that is the end of the matter." But, for the reason already pointed out, the converse does not follow, that where the board rejects the claim "that is the end of the matter."

The case of *Victors v. Kelsey*, 31 Cal. App. 796, [161 Pac. 1006], involved the question of the authority of the district attorney to incur an expense in securing the testimony of an expert in a criminal case. The board of supervisors allowed the claim, but the treasurer refused to pay it, and it was justly held by this court on appeal, affirming the decision of the superior court of Plumas County, that the board of supervisors acted within its authority in determining that the expense was a just charge against the county, and that the treasurer had no discretion in the matter, but that it was his plain duty to honor the warrant.

We think the matter can be summed up in these words: Where a claim has been allowed in full by the board of supervisors, if it be within the jurisdiction of such tribunal, it can only be attacked by a suit in equity on the ground of fraud. If it be apparent that the board has exceeded its jurisdiction in the allowance of the claim, the order may be nullified through an action brought in court, or such order may be disregarded and treated as nugatory by any officer who is called upon to give effect to the invalid determination of the board. If, however, a claim within the power of the

board to allow has been rejected, or allowed only in part, the decision of the board is not final, but by virtue of the statute the claimant may bring his action at law and establish his claim against the county as fully and effectively as it could be by a favorable order of the board in the first instance.

We think the appeal, it being upon the judgment-roll alone, is without merit, and the judgment is, therefore, affirmed.

Chipman, P. J., and Hart, J., concurred.

---

[Civ. No. 2156. Second Appellate District.—June 4, 1918.]

**WILLIAM LUTTON, Appellant, v. WILLIAM F. RAU, Respondent.**

**LANDLORD AND TENANT—ASSIGNMENT OF LEASE—ACTION FOR RENTS—**

**APPEAL FROM JUDGMENT—RECORD—PRESUMPTION.**—On an appeal from a judgment on nonsuit in an action to recover rents accruing under a written lease subsequent to the assignment thereof, where the appeal is presented upon the judgment-roll and a meager statement of stipulated facts, it must be assumed under the pleadings and judgment that when the assignment was made, the assignee entered into no contract with the lessor affirmatively binding himself to fulfill the covenants of the lease, other than such obligations as would be imposed by entry and taking possession of the demised premises.

**ID.—ASSIGNMENT OF LEASE—OBLIGATIONS TO LESSOR.**—An occupant of real property holding possession by bare assignment of the lessee assumes to the lessor only such obligations as arise out of the privity of estate as distinguished from those arising upon privity of contract.

**ID.—TERMINATION OF LIABILITY—RIGHT OF ASSIGNEE.**—A covenant to pay rent is deemed to be a covenant running with the land, and an assignee of a lessee, in the absence of express contract, remains liable only for the payment of rent during the period of his occupancy, and may terminate his liability by reassignment.

**ID.—SECOND ASSIGNMENT—EVIDENCE.**—In an action by a lessor against an assignee of the lessee for rents accruing subsequent to an assignment in turn by such assignee to others, evidence of the latter assignment was properly excluded.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Charles Monroe, Judge.



The facts are stated in the opinion of the court.

Ray Howard, for Appellant.

Cates & Robinson, for Respondent.

JAMES, J.—In this action judgment of nonsuit was entered against the plaintiff, who has appealed. The suit was brought for the purpose of enforcing a demand for rent alleged to be held against the respondent Rau as assignee of the codefendants named herein of a lease to certain store-rooms located in the city of Los Angeles. The lease was made by the assignor of plaintiff with defendants Roggy & Runge, a copartnership. It was alleged that this lease was afterward assigned to respondent, who entered upon and occupied the premises and who later attempted to assign his rights to other persons. It was to recover rents accruing subsequent to the last alleged assignment that the action was brought. Judgment by default was entered against the lessees Roggy & Runge. The appeal being presented upon the judgment-roll and a meager statement of facts, we must assume that the evidence was sufficient to support the determination of the trial judge and insufficient to support the issues tendered by the plaintiff in his complaint as to all matters except such as are specifically covered by the stipulation of facts. We are required to assume, then, under the pleadings and judgment, that when Roggy and Runge assigned to respondent Rau, Rau entered into no contract, either with his assignors or the lessor, affirmatively binding himself to fulfill the covenants of the lease, other than such obligations as would by implication be imposed upon him because of his entry and assuming possession of the leased premises. It is well-established law that an occupant of real property holding possession by bare assignment of the lessee assumes to the lessor only such obligations as arise out of the privity of estate as distinguished from those arising upon privity of contract. (1 Washburn on Real Property, 6th ed., secs. 682, 683; also sec. 1205, vol. 2.) A covenant to pay rent is deemed to be a covenant running with the land—that is, covenant concerning the land itself, in whosoever hands it may be. (*Allen v. Culver*, 3 Denio (N. Y.), 284; *Salisbury v. Shirley*, 66 Cal. 223, [5 Pac. 104]; *Bonetti v. Treat*, 91 Cal. 223, [14

L. R. A. 151, 27 Pac. 612].) An assignee of a lessee, in the absence of express contract, remains liable only for the payment of rent during the period of his occupancy, and may terminate his liability by reassignment. (1 Tiffany on Landlord and Tenant, pp. 987, 988; *Fletcher v. McFarlane*, 12 Mass. 43.)

The only reference to evidence received or offered at the trial is that found in one paragraph of the stipulated statement of facts. It appears that the plaintiff offered in evidence a written assignment made by respondent to one Tyler, wherein it was recited that respondent Rau, upon a certain consideration, assigned to Tyler all his interest in "lease of room at No. 524 South Spring Street, together with," etc. We are obliged to look to the judgment of nonsuit, which contains recitals not presented in the form of findings of fact, in order to be apprised that this alleged assignment was actually offered in evidence. In the recitations referred to it is set out that the assignment was offered and that an objection thereto was sustained. Conceding that the record is in sufficient form to properly present the objection, we are of the opinion that no error was committed in refusing to allow the instrument of assignment to be introduced in evidence. We do not think that, under the authorities hereinbefore cited, the production of such an assignment would aid the plaintiff in making out his claim against the defendant for rent which accrued subsequent to the date of the transfer of possession of the premises from respondent to the last holder.

The judgment is affirmed.

Conrey, P. J., and Works, J., *pro tem.*, concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on July 1, 1918.

[Civ. No. 2427. First Appellate District.—June 4, 1918.]

CLARENCE GRANGE, Respondent, v. AMERICAN NATIONAL BANK OF SAN FRANCISCO (a Corporation), Appellant.

**CLAIM AND DELIVERY—VALUE OF SECURITIES—FINDING—APPEAL.**—In an action in claim and delivery for the recovery of certain securities, the appellate court is concluded by the finding that the value of the securities is as alleged, no segregation of the different securities being made, and the appellant cannot take advantage of clerical error in the recital of the value of a portion thereof.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. Jas. M. Troutt, Judge.

The facts are stated in the opinion of the court.

H. Clyde Harms, for Appellant.

R. P. Henshall, for Respondent.

**THE COURT.**—This is an action in claim and delivery brought for the recovery of certain securities. Plaintiff had judgment for the delivery of the same, and in the event that such could not be had, then for the sum of \$3,155, the alleged total value thereof. The appeal is taken on the judgment-roll alone.

Appellant claims that the judgment should be reversed, for the reason that it does not clearly specify what is to be done.

There is no merit in the appeal. The claimed uncertainty is based upon recitals with reference to the proceeds had from the sale of certain bonds which it was stipulated might be sold pending the litigation. With this change the findings follow the complaint, and judgment is given for the return of the unsold specific personal property described therein, together with the sum of \$1,764.33, the amount received from the sale of the bonds. In case delivery of the specific personal property cannot be had, then the alternative portion of the judgment provides for an amount which constitutes the full value of the property sued for, included in which is the sum derived from the sale. There is no uncertainty in the judgment.

Appellant further seeks to take advantage of a clerical error in the recital of the value of a portion of the securities sued for. The complaint recited that all of the securities were of the value of \$3,155. The answer alleged their value to be not greater than the sum of two thousand dollars. The findings and judgment determine that the value of the personal property sued for is as alleged, no segregation of the different securities being made. On the question of value we are concluded by the finding.

Judgment affirmed.

---

[Crim. No. 724. First Appellate District.—June 4, 1918.]

THE PEOPLE, Respondent, v. LEO KAWANANAKOA,  
Appellant.

**CRIMINAL LAW—LARCENY—CUSTODIAN OF PROPERTY.**—A person not hired for a servant, but for a caretaker, whose principal duty was to see that no one took anything out of the house of his employer, is guilty of larceny, and not of embezzlement, in feloniously taking personal property from the house.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco, and from an order denying a new trial. George H. Cabaniss, Judge.

The facts are stated in the opinion of the court.

Jay Monroe Latimer, for Appellant.

U. S. Webb, Attorney-General, and John H. Riordan, Deputy Attorney-General, for Respondent.

**THE COURT.**—Defendant was charged by information with the crime of grand larceny. He was tried, convicted, and sentenced under the indeterminate sentence law. He now appeals from the judgment and from an order denying his motion for a new trial.

The information charged the defendant with having, on or about November 10, 1916, at the city and county of San

Francisco, feloniously taken an electric lamp, one lot of silverware, one lot of cut glass, certain pictures, a sewing-box, and one lot of linen, the same being the personal property of C. E. Blanchard.

Defendant makes no point on this appeal other than that of the sufficiency of the evidence. As to this he claims that the evidence is insufficient in four respects, namely: (1) That there is no proof that the property in question was that of the complaining witness; (2) that the evidence failed to show that the property was stolen by defendant from Blanchard; (3) that the evidence was insufficient to show that the value of the articles stolen was more than fifty dollars; (4) that there is a variance, in that the crime proven is that of embezzlement and not larceny.

An examination of the record discloses that there is no merit in points 1, 2, and 3. As to the fourth, appellant's contention is that the defendant was shown to be a servant who fraudulently appropriated property which had come into his care by virtue of his employment as such servant, and that this brought him within the provisions of section 508 of the Penal Code. But in making this contention counsel overlooks the fact established by the complaining witness' testimony, that the defendant was a mere caretaker of his premises, whose principal duty was to see that no one took anything out of the house. Quoting the record: "A. He was not hired for a servant. He was hired for a caretaker. Q. And as a caretaker, what were his duties? A. To look after the house and see that it was kept clean, and that nobody took anything out of it, principally."

Counsel erroneously assumes that because the defendant was possibly a custodian of the property, the same was in his possession; but he overlooks the distinction between possession and custody. This distinction is quite appropriately pointed out in Bishop's New Criminal Law, volume 2, page 486:

"Sec. 824. 1. Possession and custody are in this branch of the law widely distinguishable. There can be no trespass against the custody; it is always against the possession, and it can be committed as well by the custodian as by any other person. For example—

"2. Servant. When a master's goods in possession come within the handling of the servant, the latter has in law no

more than a custody of them, the possession remaining in the former. Therefore the servant may commit larceny of them, as, if a clerk in a store feloniously remove goods from it, this is larceny. . . .

"3. Custodian Generally. Where any person, whether servant or not, has the bare charge or care of another's effects, 'the legal possession,' observes East, 'remains in the owner; and the party may be guilty of trespass and larceny in fraudulently converting the same to his own use.' "

Thus it was held in the case of *People v. Belden*, 37 Cal. 51, where a livery-stable owner had employed the defendant as caretaker of his livery-stable, and although the owner was absent and the defendant was in charge at the time the latter asported certain horses, the defendant was guilty of larceny and not embezzlement. The court there said: "The defendant occupied only the relation of servant to McComb, and although he had labors and duties to perform in respect to the horses, he was not intrusted with them in the sense of the statute."

This fourth contention of the appellant must, therefore, be disallowed.

The judgment and order are affirmed.

A petition for a rehearing of this cause was denied by the district court of appeal on July 3, 1918, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 1, 1918.

---

[Crim. No. 598. Second Appellate District.—June 4, 1918.]

THE PEOPLE, Respondent, v. H. B. SANSOM, Appellant.

**CRIMINAL LAW — MAILING OF FORGED CHECK — COLLECTION IN ANOTHER STATE—CRIME PARTLY COMMITTED IN THIS STATE.**—Under section 27 of the Penal Code, which provides that all persons who commit, in whole or in part, any crime within this state, are liable to punishment under the laws of this state, a person who mailed a forged check in a foreign country to a bank in this state with instructions to such bank to mail the check for collection to a bank in another state is guilty of a crime committed in part within this state, and is liable to punishment therefor.

APPEAL from a judgment of the Superior Court of Los Angeles County, and from an order denying a new trial. Paul J. McCormick, Judge.

The facts are stated in the opinion of the court.

Guy Eddie, and Chas. R. Morfoot, for Appellant.

U. S. Webb, Attorney-General, Joseph L. Lewinsohn, Deputy Attorney-General, and Jerry H. Powell, for Respondent.

CONREY, P. J.—Forgery. The defendant appeals from the judgment, and from an order denying his motion for a new trial.

The information in this case charges that on or about the eighteenth day of October, 1917, at the county of Los Angeles, state of California, the defendant had in his possession a check in writing for the payment of money, and then and there, knowing the same to be a forged check, did willfully, etc., utter, publish, and pass the said check with the name of Alice G. Sowle falsely signed thereon as true and genuine, with the intent then and there and thereby to cheat and defraud the said Alice G. Sowle, the Bank of Bisbee, a corporation, and the Continental National Bank, a corporation.

At all times mentioned herein Alice G. Sowle had on deposit in the Bank of Bisbee the sum of \$5,512.76. The check in question called for that sum and was made payable to the order of Continental National Bank. On the seventeenth day of September, 1917, the defendant, under the name of Herndon McNeil, opened an account in the Continental National Bank. On or about the eighteenth day of October, 1917, the Continental National Bank received by mail the check in question, together with a letter signed by the defendant under the name Herndon McNeil. That letter was dated Tia Juana, Mexico, October 16, 1917, and instructed the bank as follows: "I hand you a check of Alice G. Sowle for \$5,512.76 payable to yourselves, which kindly collect and credit my account with the proceeds. Mail the receipt for the check and advice of payment to me at General Delivery, Los Angeles." The bank forwarded the check to the Bank of Bisbee, Arizona, and that bank refused payment on the ground that the check was forged. The evidence shows that in fact it was forged.

We will state defendant's principal ground of appeal in the words of his counsel, as follows: "It is the contention of the defendant that no crime was committed within the jurisdiction of the state of California, for the reason that as far as the proof shows the check was mailed from Tia Juana, Mexico, and if forged was presumptively forged there and sent to the bank in Los Angeles, with such instructions to the said bank as would require the said bank, as the agent of the defendant, to mail the check to Arizona for collection, so that there could be no uttering of the said check in California, and that the uttering did not take place until the check was presented to the Bank of Bisbee, in the state of Arizona, for payment. So that neither one of the elements necessary to constitute the offense as charged in the information against this defendant was consummated or carried out in California. Defendant raised the question of venue on a motion for an instructed verdict in the trial of this cause and by a motion in arrest of judgment and for a new trial. All of these motions were denied."

The bank did not keep the envelope in which it received the letter from the defendant, and there is no testimony stating what place of mailing was shown by postmark on the envelope.

Defendant contends that the court erred in instructing the jury that the mailing of the check by the bank at Los Angeles to Bisbee, Arizona, constituted an uttering of the check in California. The instruction is as follows: "If you believe the evidence of the prosecution, that under such evidence the Continental Bank was the agent of the defendant, and if you have a reasonable doubt whether or not such bank did any overt act toward passing or uttering the forged check if any you must give the defendant the benefit of that doubt if any. If, however, you believe beyond all reasonable doubt that the defendant, knowing the said check to be false, forged and counterfeited, mailed the same to said Continental Bank at Los Angeles, California, with the intent and design that said bank should pass and utter the same by causing it to be presented to the Bank of Bisbee, of Bisbee, Arizona, and if you further believe beyond all reasonable doubt that the said Continental Bank, upon receiving the said false, forged, and counterfeited check if any, did in Los Angeles County, state of California, place the same in the United States mails ad-



dressed to the Bank of Bisbee, at Bisbee, Arizona, with postage prepaid, and with the intent and for the purpose of causing the same to be presented to the said Bank of Bisbee, then you are instructed that you should find the defendant guilty, and that it is wholly immaterial whether anyone was defrauded or not, and is likewise immaterial where the defendant was when he caused said forged check to be placed in possession of the said Continental Bank, if he did so."

Section 27 of the Penal Code of California provides that "All persons who commit, in whole or in part, any crime within this state," are liable to punishment under the laws of this state. In *People v. Botkin*, 132 Cal. 232, [84 Am. St. Rep. 39, 64 Pac. 286], the case then before the supreme court was stated as follows: "Defendant, in the city and county of San Francisco, state of California, sent by the United States mail to Elizabeth Dunning, of Dover, Delaware, a box of poisoned candy, with intent that said Elizabeth Dunning should eat of the candy and her death be caused thereby. The candy was received by the party to whom addressed, she partook thereof, and her death was the result. Upon these facts may the defendant be tried for the crime of murder in the courts of the state of California?" The court then quoted section 27 of the Penal Code and stated its conclusion as follows: "The acts of defendant constituted murder, and a part of those acts were done by her in this state. Preparing and sending the poisoned candy to Elizabeth Dunning, coupled with a murderous intent, constituted an attempt to commit murder, and defendant could have been prosecuted in this state for that crime, if, for any reason, the candy had failed to fulfill its deadly mission. That being so—those acts being sufficient, standing alone, to constitute a crime, and those acts resulting in the death of the person sought to be killed—nothing is plainer than that the crime of murder was in part committed within this state. The murder being committed *in part* in this state, the section of the law quoted declares that persons committing murder under those circumstances 'are liable to punishment under the laws of this state.' The language quoted can have but one meaning, and that is: a person committing a murder in part in this state is punishable under the laws of this state, the same as though the murder was wholly committed in this state."

So here, when the defendant caused his agent to send, and it did send, the forged check to the Bank of Bisbee to be paid by that bank, and the check so sent was received by the Bank of Bisbee, then, if not before, he was guilty of forgery by an attempt to pass the check, knowing its true character, and with intent to defraud. (Pen. Code, sec. 470.) And if for some reason the check had failed to reach the Bank of Bisbee, defendant could have been convicted, under the information in this case, of an attempt to commit the offense. (Pen. Code, secs. 664, 1159; *People v. Oates*, 142 Cal. 12, [75 Pac. 337].) "That being so—those acts being sufficient, standing alone, to constitute a crime," and those acts resulting in the actual completion of the crime charged, "nothing is plainer than that the crime of" forgery "was in part committed within this state," and the defendant is liable to punishment as provided by section 27 of the Penal Code, because he did commit, in part, a crime within this state. We think that the instruction in question was a correct statement of the law.

The judgment and order are affirmed.

James, J., and Works, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 1, 1918.

---

[Civ. No. 2263. First Appellate District.—June 5, 1918.]

ELIZABETH M. CONNELL, Administratrix, etc., Appellant, v. ROBERT J. MCGAHIE et al., Respondents.

**INJUNCTION — TRESPASS UPON TIDE-LAND LOTS — CROSS-COMPLAINT ASSERTING EASEMENT — DESCRIPTION OF PROPERTY — SUFFICIENCY OF CROSS-COMPLAINT.**—In an action to enjoin the defendants from trespassing upon tide-land lots, wherein they by cross-complaint sought to subject the lots to a private easement for a right of way for a wharf, the cross-pleading sufficiently describes the property by referring to it as "Ackerman's Cove," and alleging that the same is the property described in the plaintiff's complaint, the easement

not being directed to any part of the lands, but affecting the entire tract.

**ID.—PUBLIC AND PRIVATE EASEMENT IN SAME WATERS — CROSS-COMPLAINT NOT INCONSISTENT.**—In such an action, there is no fatal contradiction in alleging in the cross-complaint a public easement for the use of alleged navigable waters and a private easement consisting in part of the same use of the identical waters, since they are based upon separate and distinct rights.

**ID.—ENFORCEMENT OF RIGHTS — RIGHT OF LESSEE OF EASEMENT.**—A lessee of a right of way for a wharf has the right to file a cross-complaint asserting his rights under the easement.

**APPEAL** from a judgment of the Superior Court of Marin County. Edgar T. Zook, Judge.

The facts are stated in the opinion of the court.

Henry F. Marshall, and Walter J. Thompson, for Appellant.

Thos. P. Boyd, and Robert J. McGahie, *in pro. per.*, for Respondents.

**THE COURT.**—This is an appeal from a judgment declaring certain land subject to an easement and prohibiting interference with the same.

The complaint alleged ownership in plaintiff of certain tide-land lots situated in Marin County, to which he deraigned title from the state by deed to his predecessors from the board of tide-land commissioners. Upon these lots clam-beds had been established, and to protect the clams from predatory fish, plaintiff had erected and maintained fences thereon. He complained that the defendants had trespassed upon the property, broken down his fences, thereby admitting the predatory fish to the clam-beds, to the consequent destruction of the clams, for which he sought damages and an injunction against future threatened injury. To this complaint defendants filed a joint answer and cross-complaint, bringing in also another party defendant. The defendant Ackerman in his cross-complaint pleaded that his codefendants, the Reeds, were the owners of the upland known as Strawberry Point surrounding "Ackerman's Cove," which, it appears from the pleadings, is the name by which plaintiff's lands are known, and were also the owners of a private

easement to construct and maintain a wharf across the tidelands and out into the waters of "Ackerman's Cove," and a further right to the use of the waters of San Francisco Bay covering the cove for landing and mooring purposes for 150 feet on either side of the wharf, with the right of way from the end of the wharf across the waters of San Francisco Bay covering the cove to the channel of the bay. He further alleged that the wharf had been erected and maintained many years prior to the commencement of the action, and that cross-complainant was a tenant of the Reeds, renting one acre of land from them bordering on "Ackerman's Cove," together with the private easement above referred to; that he had erected a residence and boathouse on the leased premises, and engaged in the business of fishing and renting boats, and that plaintiff had destroyed the wharf and prevented its rebuilding, and had built a fence across "Ackerman's Cove," thereby obstructing access to his leased land, and destroying his business. He also averred that the waters covering Ackerman's Cove are part of the navigable waters of the state, and that plaintiff had only a public right of fishing and navigation thereon common to all citizens.

This pleading in substance contains all the allegations of the other pleadings of the defendants, and the recital of the facts contained therein is all that is necessary for a discussion of the case.

To this cross-complaint plaintiff interposed a demurrer, which was overruled, and, plaintiff failing to answer, his default was regularly entered, and evidence being introduced in support thereof, judgment was entered by the court in favor of said cross-complainant. No separate judgment upon the default was ever entered, it being incorporated in the final judgment between all the parties.

Upon the pleadings of the other defendants the case went to trial, and judgment was against plaintiff and in favor of cross-complainants. The court found that plaintiff was the owner of the land described in the complaint, but that it was subject to two easements: One in favor of the Reeds for a right of way for a wharf and the use of the navigable waters of the bay of San Francisco, and the other a public easement for the use of those waters for navigating, hunting, and fishing. As conclusions of law the court found that the

Reeds were entitled to one hundred dollars damages; that they were the owners of the private easement claimed by them, and that an injunction issue restraining plaintiff from interfering with the private easement or from maintaining a fence on any of his land which interfered with the free use of the waters of Ackerman's Cove for hunting, fishing, or navigating. Formal judgment followed, in which it was also decreed that defendant and cross-complainant Ackerman have judgment from plaintiff for the sum of \$970 damages, and that he have an order removing the fence and a permanent injunction restraining plaintiff from ever erecting any fence or obstruction upon his lands, and further, that an injunction issue against plaintiff from in any manner obstructing the free use of the waters covering the lands by citizens of the state for the purpose of hunting, fishing, or navigation.

A motion for a new trial was had, which was granted "except as to the issues raised by the cross-complaint of Ackerman." From this order plaintiff has appealed.

It is the claim of plaintiff that the judgment, in so far as the same rests upon such cross-complaint, should be reversed. As we view the record, the only question that is presented for our consideration is the sufficiency of the pleading to support the judgment. Aside from this question, it is first urged as ground for reversal that the court erred in inserting in the order granting the new trial the proviso excepting from its operation the issues raised by the cross-complaint of Ackerman. In this behalf it is argued that plaintiff's motion for a new trial was both in fact and by legal intent directed solely to the issues of plaintiff's complaint and the cross-complaints of the Reeds, together with the respective answers thereto, and was not, and could not be, directed toward the Ackerman cross-complaint, for the reason that a motion for a new trial does not lie to a default judgment. Plaintiff having failed to answer the cross-complaint of Ackerman, the court was undoubtedly without power to grant the motion for a new trial as to the issues raised by this cross-complaint. It is manifest, however, that the mention by the trial court of the Ackerman cross-complaint was a mere matter of precaution made for the sole purpose of protecting Ackerman, and in no manner affected his judgment.

As to the sufficiency of the pleading it is argued by the appellant that the cross-complaint does not state a cause of action, for the reason that it utterly fails to describe the property claimed to be subject to the easement.

The land over which the right of way is claimed is there referred to as "Ackerman's Cove," which it is alleged is the property described in plaintiff's complaint. The asserted private easement is not directed to any particular part or parcel of plaintiff's lands, but, according to the allegations, affects the entire tract. Under these circumstances we are of the opinion that the description designating the lands subject to the easement in the manner indicated is sufficient.

Again, it is contended that the cross-complaint is fatally contradictory, in that it alleges a public easement for the use of alleged navigable waters, and a private easement consisting in part of the same use of the identical waters.

We see nothing contradictory in these allegations. They are based upon separate and distinct rights.

Equally without merit is the claim that Ackerman is not entitled to assert a cross-complaint. It is alleged by him that his lessors were the owners of a right of way over the property described in plaintiff's complaint, and that he as lessee had been for more than seventeen years in the use and possession of this right. It thus appears that the relief demanded affects the property to which the action relates, and this is sufficient to entitle him to the relief. (Code Civ. Proc., sec. 442.) And an occupant of any estate in a dominant tenement may maintain an action for the enforcement of an easement attached thereto. (Civ. Code, sec. 809. See, also, 7 Cyc. Pl., p. 256.)

The judgment is further assailed for the reason that a portion thereof prohibits the obstruction of the free use of the waters covering the lands by the residents and citizens of the state for hunting, fishing, and navigating, which portion, it is claimed, is unwarranted.

The grant of the tide-lands in question from the state to plaintiff's predecessors was under the act of March 30, 1868. (Stats. 1867-68, p. 716.) It is conceded that under the authority of *Knudson v. Kearney*, 171 Cal. 250, [152 Pac. 541], this portion of the judgment is without warrant and should be eliminated therefrom. This authority, however, in no

manner affects the private easement adjudged to exist in favor of cross-complainant. This right was claimed to have accrued to him long subsequent to the date of the grant.

Other points do not require consideration.

For the reasons given the judgment in favor of Ackerman, modified in the particular indicated, is affirmed, said respondent to recover his costs upon this appeal.

---

[Civ. No. 2261. Second Appellate District.—June 5, 1918.]

WILLIAM SEA, Jr., Respondent, v. J. P. LORDEN,  
Appellant.

APPEAL—ALTERNATIVE METHOD—PRINTING OF RECORD IN BRIEF.—On an appeal taken under the alternative method, the parties must print in their briefs such portions of the record as they desire to call to the attention of the court.

ID.—TYPEWRITTEN TRANSCRIPTS NOT REVIEWABLE.—Appellate courts will not look to the typewritten transcripts filed under the alternative method of appeal for the purpose of determining whether grounds exist for the reversal of the judgment appealed from.

OPEN ACCOUNT—ALLOWANCE OF INTEREST.—In an action for the reasonable value of goods on an open account, interest is allowable only from the date upon which the balance is ascertained.

APPEAL from a judgment of the Superior Court of Imperial County. Franklin J. Cole, Judge.

The facts are stated in the opinion of the court.

H. L. Welch, and B. S. Gregory, for Appellant.

William Sea, Jr., *in pro. per.*, for Respondent.

WORKS, J., *pro tem.*—This is an appeal prosecuted under what is known as the alternative method, a method characterized by Mr. Justice Shaw in *Estate of Gamble*, 166 Cal. 253, [135 Pac. 970], as “a pitfall for the unwary.” Such it has been and such it continues to be, but the virtue of continually calling the attention of the profession to the repeated depart-

ures from proper procedure under the method has had little more reward than that which is said to be virtue's own. These remarks are prompted by the fact that the present case exhibits another instance of a failure to observe the provisions of section 953c of the Code of Civil Procedure, to the effect that, on an appeal under the alternative method, the parties must print in their briefs "such portions of the record as they desire to call to the attention of the court." In a recent opinion we have cited many cases to the proposition that "appellate courts will not look to the typewritten transcripts filed under the alternative method of appeal for the purpose of determining whether grounds exist for the reversal of the judgment appealed from" (*Barker Bros. v. Joos*, 36 Cal. App. 311, [171 Pac. 1085]). In the present case there has been some effort to comply with the rule requiring a printing in the briefs of the necessary parts of the record, but enough does not appear to enable us to pass upon the questions which the appellant seeks to present upon the appeal, with the exception of the one which we discuss below.

The statements of facts in the briefs of the respective parties agree in showing, and extracts from the findings of fact indicate, that the action is one to recover the reasonable value of goods sold and delivered. The statements of fact made in the brief of the respondent, and the direction for judgment as stated in the findings, printed in appellant's brief, show that the trial court in its judgment allowed interest upon the claim sued on from the date of the last delivery of goods; but in an action for the reasonable value of goods on an open account interest is allowable only from the day upon which a balance is ascertained. (*Erickson v. Stockton & T. C. R. Co.*, 148 Cal. 206, [82 Pac. 961]; *Merchants' Collection Agency v. Gopcevic*, 23 Cal. App. 216, [137 Pac. 609].) The judgment itself is not before us in the printed briefs, but we may safely direct a modification of it by striking out any language it contains making an allowance of interest from any date. Under the decisions above cited, the respondent is entitled to interest only from the date of the judgment, and he is allowed that by operation of law (Civ. Code, sec. 1920; Code Civ. Proc., sec. 1035).

The judgment is modified by striking therefrom such part thereof as allows interest on the principal sum for which



judgment is awarded the respondent, and as so modified it is affirmed.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 1, 1918.

---

[Civ. No. 2263. Second Appellate District.—June 5, 1918.]

PETER CEREMONY, Respondent, v. F. L. DRUMMOND.  
Defendant; PACIFIC COAST CASUALTY COMPANY  
(a Corporation), Appellant.

**ACTION ON BOND—BUILDING CONTRACT—PAYMENT OF MONEY—PLEADING—SUFFICIENCY OF COMPLAINT—SUPPLEMENTAL COMPLAINT.**—In an action on a building contractor's bond, if the complaint as originally filed was not sufficient, in that it failed to show at the date of the commencement of the suit the plaintiff had actually paid out the money, reimbursement of which was sought in the action, it could not be helped out by supplemental complaint filed thereafter.

**ID.—BREACH OF CONTRACT—SUFFICIENCY OF COMPLAINT.**—In such an action, an allegation that the contractor did not pay, as required by the bond, all claims for labor and material, and that certain enumerated claims were made for materials alleged to have been furnished to be used, and actually used, in the construction of the building, was sufficient to show a breach of contract.

**ID.—ACTION ON BOND—ACTUAL PAYMENT OF CLAIMS UNNECESSARY.**—Under a bond guaranteeing payment by the contractor of all claims for labor and material, where the contractor made default, the owner could maintain an action on the bond without actually satisfying such claims.

**APPEAL** from a judgment of the Superior Court of the County of Riverside. Hugh H. Craig, Judge.

The facts are stated in the opinion of the court.

V. J. Cobb, for Appellant.

Miguel Estudillo, for Respondent.

JAMES, J.—The defendant Casualty Company appeals from a judgment entered in this action favorable to the plaintiff.

A contract having been made between the plaintiff as owner and defendant Drummond as contractor, the appellant Casualty Company became surety for the contractor that the contract would be faithfully performed. The general obligation of the surety was expressed in that clause of the undertaking which guaranteed that the contractor would pay in full the claims of all persons performing labor upon or furnishing materials to be used in the work. Plaintiff in his complaint alleged that the contractor neglected and failed to comply with the terms of his contract and failed to pay for labor and materials in excess of the contract price (specifying names of claimants and amounts), which labor and materials it was further alleged "were furnished to be used and were used in the construction of said building." Allegations followed to the effect that the contractor's debtors mentioned had filed claims of lien against the property of the plaintiff and were threatening to foreclose the same. Two objections are made as against the judgment: First, that the complaint did not in its allegations show that the claims made against the property of the plaintiff on behalf of Drummond's debtors were valid or enforceable; second, that no recovery could be had on the bond given by appellant until payment of the claims had actually been made by the plaintiff. It may be here stated that in the course of the trial a supplemental complaint was allowed to be filed which showed that the plaintiff had satisfied the demands of the lien claimants. Of course, it is clear that if the complaint as originally filed was not sufficient, in that it failed to show that at the date of the commencement of the suit plaintiff had actually paid out the money, reimbursement of which was sought in the action, it could not be helped out by supplemental complaint filed thereafter. So, then, the case is to be viewed as though no supplemental complaint had been filed. The condition of the bond of appellant was that the contractor would pay all claims for labor and material. It is alleged in the complaint that this was not done, but that certain enumerated claims were made for materials alleged to have been furnished to be used, and actually used, in the construction of the building. We think the allegations of

the complaint were sufficient to show a breach of the contract. We think that the effect of the allegations in the complaint respecting the claims made is that the claims were *bona fide* and for actual labor and materials furnished. As no evidence is brought up and no point made as to its sufficiency, we must presume in support of the findings of fact that there was evidence to sustain them. The second point urged—that plaintiff could not maintain an action on the bond until he had actually satisfied the claims of claimants—viewing the contract of the surety, we think should not be sustained. Contracts of this nature are now generally held to be contracts of indemnity against liability, rather than indemnity against loss sustained and paid. As we have before noted, the surety under its contract guaranteed that the building contractor would pay all claims for labor and materials furnished. The contractor's default in this regard created a breach of the obligation of the surety toward the owner. Almost identical conditions in a bond on a building contract were considered by the supreme court of Washington in *Friend v. Ralston et al.*, 35 Wash. 422, [77 Pac. 794], where the court said: "The covenant in the building contract on the part of the contractors with Mrs. Friend is, as between them, equivalent to a direct promise to pay for materials used in the construction of the building, and a breach of the contract occurred when the contractors suffered the obligation to become a charge on her property. At least, she was entitled to treat the same as a breach. It may be true that she was not obligated to do so; that she could have waited until the lien had become fixed and determined by judgment against her property, and treated that as the breach of the bond, thus escaping the *onus* of establishing at the trial the validity of such lien and the amount of the indebtedness. But she was not obliged to delay action in that behalf. She could treat the failure of the contractors to keep her property free from such encumbrance as a breach of the contract. Therefore, the position of appellant's counsel that this action was prematurely brought is untenable." (See, also, *Kiewit v. Carter*, 25 Neb. 460, [41 N. W. 286]; and note following *Stephens v. Pennsylvania Casualty Co.*, 3 Ann. Cas. 478.)

The judgment appealed from is affirmed.

Conrey, P. J., and Works, J., *pro tem.*, concurred.

[Civ. No. 1840. Third Appellate District.—June 5, 1918.]

W. M. DOTY, Respondent, v. CALIFORNIA RICE MILLING CO. (a Corporation), et al., Appellants.

**VENDOR AND VENDEE—SALE OF PROPERTY—CONSIDERATION—CORPORATION STOCK.**—In this action to enforce a vendor's lien upon certain real estate, it is held that there is nothing in the language of the instruments involved, nor in the circumstances surrounding the transaction, nor in the conduct of the parties, to warrant the conclusion that a cash payment for the property was contemplated, the sole consideration for the conveyance being the transfer to the vendor of corporation stock.

**VENDOR'S LIEN—PAYMENT OF PRICE IN STOCK—CODE SECTION INAPPLICABLE.**—Section 3046 of the Civil Code, giving one who sells real property a vendor's lien independent of possession for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer, does not apply where the price is paid by the issuance of shares of corporation stock.

**1. a.—SALE OF PROPERTY FOR STOCK—ESCROW—DELIVERY UPON PAYMENT OF EXISTING MORTGAGE—RIGHT OF VENDOR.**—Where an agreement for the sale of real property subject to a mortgage provided that corporation stock was to be issued in payment for the property and placed in escrow as security for the performance of the vendor's agreement to convey the property free from liens, the vendor cannot, in an action to enforce his alleged lien, claim that he had not received the stock, since he could at any moment demand the same upon performance of the condition.

**Id.—ACTION TO ENFORCE VENDOR'S LIEN—EVIDENCE—NOTICE OF LIEN—TESTIMONY ERRONEOUSLY EXCLUDED.**—In an action to enforce a vendor's lien upon certain real estate, where the pleadings raised the issue as to whether the vendee or its transferee was a purchaser for value without notice of the vendor's rights, objections to testimony of officers of the corporations defendant that they had no notice of knowledge of plaintiff's claim of lien were erroneously sustained.

**APPEAL** from a judgment of the Superior Court of Butte County. H. D. Gregory, Judge.

The facts are stated in the opinion of the court.

Norman A. Eisner, Cushing & Cushing, and George F. Jones, for Appellants.

W. H. Carlin, for Respondent.

87 Cal. App.—29

CHIPMAN, P. J.—This is an action to enforce a vendor's lien upon certain real estate situated in the town of Biggs, Butte County. It is alleged in the complaint: That on November 27, 1912, plaintiff executed and delivered to California Fruit Canners' Association, a corporation, a mortgage upon said real property to secure the payment by plaintiff to said Canners' Association of the sum of two thousand five hundred dollars, payable as follows: Five hundred dollars on January 1, 1913; five hundred dollars December 1, 1913; five hundred dollars December 1, 1914; five hundred dollars December 1, 1915, and the remaining five hundred dollars December 1, 1916, with interest at the rate of six per cent per annum, which said mortgage was duly recorded May 15, 1913. That on December 1, 1913, "plaintiff did for the price or consideration of five thousand dollars to be paid to him by said defendant California Rice Milling Co., grant, sell and transfer, to-wit, the above described real property"; that said Rice Milling Company was incorporated on September 11, 1913, with a capital stock of one hundred thousand dollars, divided into one thousand shares, and that at the time of the execution and delivery of said deed, the said capital stock of said defendant California Rice Milling Company was reasonably worth fifty dollars per share; "and it was then and there agreed by and between plaintiff and said defendant California Rice Milling Co., that plaintiff should be paid the selling price of said lands in said sum of five thousand dollars by said defendant California Rice Milling Co., by the issuance by it to plaintiff of one hundred shares of its said capital stock aforesaid." That at the time of the execution of said deed there was still due and unpaid on said mortgage to said Canners' Association the sum of two thousand dollars; "and it was understood and agreed by and between plaintiff and said defendant California Rice Milling Co. that a certificate of the capital stock of the corporation should be issued in the name of plaintiff for one hundred shares as aforesaid and deposited with Sacramento Valley Bank at Biggs, Butte County, California, to be by said bank retained and held until the final payment by plaintiff of all moneys secured by said mortgage aforesaid, whereupon said stock was to be delivered over to plaintiff; and said defendant California Rice Milling Co. did forthwith, on or about said first day of December, 1913, cause to be

issued in the name of plaintiff its certificate No. 7 for one hundred shares of its said capital stock, and did place the same in and with said Sacramento Valley Bank, which received the same, all in accordance with said agreement aforesaid"; that thereafter, and until the twelfth day of November, 1914, plaintiff duly performed all acts and conditions on his part to be performed and paid installments upon said mortgage required by him to be paid up to and including said twelfth day of November, 1914, and "that up to said twelfth day of November, 1914, the capital stock of said defendant California Rice Milling Co. was and continued to be of the same reasonable value of fifty dollars per share." That on said last-named date the said Rice Milling Company transferred all of said real property, together with all of its property of every kind and nature, to the defendant California Rice Mills, Inc., "and thereby said defendant California Rice Mills, Inc., received, absorbed, gobbled up and gathered to itself all of the property of said defendant California Rice Milling Co., and thereby rendered the capital stock of said California Rice Milling Co., including that issued to plaintiff as aforesaid, and still in said Sacramento Valley Bank, utterly worthless and of no value whatsoever, and all of said stock has ever since continued to be, and still is, wholly worthless and valueless." That at the time of said transfer to said defendant California Rice Mills, Inc., defendant "had full knowledge of plaintiff's rights in and to said real property and of all the matters and things in the first eight paragraphs in this complaint set forth"; referring to the foregoing averments.

It is then alleged that defendant, California Rice Mills, Inc., was incorporated on November 6, 1914, with a capital stock at and since its incorporation of two hundred and fifty thousand dollars, divided into two thousand five hundred shares, and after receiving said transfer of said property on November 16, 1914, defendant issued its certificate No. 6 for one hundred shares of its capital stock to plaintiff, "and sent the same to said Sacramento Valley Bank for the purpose, as plaintiff is informed, believes and therefore alleges, of having the same substituted in the place and stead of said one hundred shares of stock of said California Rice Milling Co., placed there as aforesaid for this plaintiff under the terms and conditions heretofore in this complaint set

forth." That plaintiff has at all times declined to accept the said substitution of said one hundred shares of said Rice Mills, Inc., in lieu of said one hundred shares of said defendant Rice Milling Company, "and never consented in any way to or approved of said transfer of property from said California Rice Milling Co., to said California Rice Mills, Inc." That both of said certificates still "remain in charge of said bank, and plaintiff has never received any thereof." That since the execution of said deed by plaintiff on December 1, 1913, plaintiff has performed all covenants and agreements undertaken by him to be performed in connection with all the matters in said complaint set forth, and he has made all payments to said California Fruit Canners' Association which have thus far become due, "excepting only the payment falling due on the first day of December, 1914, and as to that payment he has by arrangement with said California Fruit Canners' Association obtained forbearance and extension until such reasonable time as he can adjust his affairs, and meet and pay the same, and he is now ready, willing and able to pay all moneys now due and unpaid upon said mortgage indebtedness, as well as all future payments required to be paid upon the same up to and including the last payment becoming due and payable, as aforesaid, on the first day of December, 1916." (The complaint was filed April 15, 1915.)

It is further alleged, on information and belief, that since November 12, 1914, defendant Rice Mills, Inc., "has become and now is insolvent, its business and affairs in process of liquidation, and all of its capital stock, including that placed as aforesaid in and with said Sacramento Valley Bank utterly worthless and of no value whatsoever." It is further alleged that plaintiff has at no time ever been a stockholder of, owned any stock in, or had anything to do with the management of either of said corporations, and that "plaintiff has received nothing whatsoever for his said transfer of said lands and premises in this complaint described and the whole consideration therefor in the said sum of five thousand dollars still remains unpaid, and at all times since said transfer has remained, and still remains unsecured, and the whole thereof will become due and payable to plaintiff at and upon the full and final payment of said mortgage indebtedness to said California Fruit Canners' Association aforesaid."

The prayer is for a vendor's lien upon all the lands and premises in the complaint described, "together with their improvements and appurtenances as security for the payment to him of the said selling price of said lands and premises in said sum of five thousand dollars; together with interest thereon at the rate of seven per cent per annum since the first day of December, 1913, and for costs of suit"; and that after said lien has been decreed, the same may be enforced by foreclosure and sale of said premises "and the proceeds of said sale be applied toward the payment of the amount found due and unpaid to plaintiff and secured by said lien, together with interest, expenses of sale, and costs of suit; that said certificates of stock in said Sacramento Valley Bank, as aforesaid, be ordered returned to the respective defendants causing the issuance of same; and for such other and further relief as to the court may seem meet and agreeable to equity."

A general demurrer to the complaint by the Rice Mills, Inc., was overruled and it answered generally and specifically, and also by cross-complaint. Briefly stated, it denied that plaintiff conveyed the property upon any consideration other than one hundred shares of the capital stock of the California Rice Milling Co., which was duly issued to respondent, and alleges that the transfer of the property of that company to appellant was upon valuable and adequate consideration, and that the value of the stock of that company was not in any way diminished by reason of the transfer to the Rice Mills, Inc. As separate defenses, alleged that it is the purchaser of the property for value and without notice of any claim of plaintiff; that plaintiff executed to appellant a quitclaim deed for the property, and that plaintiff agreed in writing to accept stock of this defendant in lieu of the stock of the California Rice Milling Company, which stock was duly issued by this defendant.

In an amended and supplemental cross-complaint, this defendant alleged that plaintiff agreed to convey the property free of encumbrances, and that notwithstanding plaintiff had mortgaged the property and by reason of plaintiff's failure to pay the same, and in order to prevent a foreclosure, this defendant was required to pay plaintiff's mortgage. The prayer is that plaintiff take nothing by this complaint and that defendant recover the mortgage payments made by it.



The lower court granted judgment for plaintiff, fixing a vendor's lien upon the property to the amount of \$4,795, being the principal, five thousand dollars, and interest from date of conveyance, less the mortgage payment, \$1,103.29, made by this defendant.

The judgment also ran against "the defendants W. J. Matson, George F. Braun and Charles E. Hale, as trustees for the stockholders of California Rice Milling Company, a dissolved corporation." These defendants have also appealed from the judgment, and their appeal is brought up upon another record—Civil No. 1854. The California Rice Mills, Inc., is the sole appellant herein.

The cause was tried by the court without a jury and the court made findings of fact substantially as alleged in the complaint.

It is found that plaintiff did not waive his right of a vendor's lien upon said property, but that on September 2, 1913, he executed and delivered to defendant Rice Milling Company on that day that certain agreement annexed to the answer as exhibit "A." (This is an agreement of lease by plaintiff to Charles E. Hale Company of the premises, including an agreement to sell the property to lessees or assigns at a price agreed upon, but not stated in the agreement, "free and clear from all encumbrances.") It is also found that plaintiff and said Hale Company entered into certain other agreements referred to in defendant's answer as exhibits "B" and "C." (Exhibit "B" is dated September 5, 1913, and is an agreement of plaintiff, first party, to sell said premises to said Hale Company, second party, and contains the following provision: "And the party of the second part, . . . agrees to and with the party of the first part that the party of the second part will convey without further compensation to the party of the first part, or his assigns, an interest in the Rice Milling Company owned and controlled by the party of the second part, or its assigns, to the value of five thousand (\$5,000.00) dollars, in full paid-up stock in the said Rice Milling Company of the party of the second part. Said fully paid-up stock to be one hundred (100) shares, with a par value of one hundred (\$100.00) dollars per share, based on an incorporation of one hundred thousand dollars.")

Exhibit "C" is dated September 5, 1913, and acknowledges the receipt by plaintiff from Charles E. Hale Company, Inc., of ten dollars "as part payment for the following described real property," the premises in question, and further states: "The entire price to be paid for said above described real property is \$5000.00 (Five thousand 00/100 Dollars), and to be paid as follows: as written and stated in document called 'Agreement' and signed by Wm. M. Doty, Esq., of Biggs, California, known as party of the first part, and The Charles E. Hale Co., Inc., of San Francisco, Cal., known as the party of the second part, and which document called 'Agreement' is hereby made part of this 'Contract.' (Ex. B.) Title to be perfect; search of the same to be made; deed to be executed and delivered by the said Wm. M. Doty, Esq., to The Charles E. Hale Company, Inc. or its assigns on or before the second (2nd) day of September, A. D. 1915, together with an abstract showing a merchantable title. Said above described parcel of real property at time of execution of deed to be free and clear of all incumbrances of every name and kind, whatsoever. Provided, however, that the payment of amount as stated in document (called 'Agreement') is paid at said date, but if not paid on or before the said Second (2nd) day of September, A. D. 1915, then this contract to be of no effect, and in that event the said \$10.00 Ten Dollars to be retained by Wm. M. Doty, Esq., as liquidated damages. Time is of the essence of this contract."

It is further found that on November 12, 1914, when the Rice Milling Company conveyed said property to defendant Rice Mills, Inc., "the latter paid to the former a valuable consideration for the lands, premises and property conveyed." It is found that "Chas. E. Hale Company was in fact the predecessor and promoter of the defendant California Rice Milling Company, and on or about the 29th day of September, 1913, said Charles E. Hale Company did transfer all of said agreements referred to as Exhibits 'A', 'B' and 'C' respectively to the defendant California Rice Milling Company, and the said deed executed by plaintiff on the 1st (2nd) day of September, 1913, as aforesaid, followed and was in accordance with the provisions of said Exhibit 'B'"; that defendants Matson, Hale, and Braun, trustees of said dissolved corporation, defendant Rice Milling Company, assigned and transferred to the Rice Mills, Inc., said agree-

ments "A," "B," and "C," and to prevent foreclosure, said Rice Mills, Inc., on October 12, 1915, paid to the mortgagee, California Fruit Canners' Association, upon the debt secured by said mortgage, five hundred dollars principal and \$94.79 interest, being the installment due December 1, 1914, and interest on whole amount unpaid, and on December 6, 1916, it paid another installment of five hundred dollars and interest falling due December 1, 1915, leaving the remaining installment of five hundred dollars payable December 1, 1916.

As conclusions of law the court found that plaintiff is entitled to judgment against defendants for the sum of five thousand dollars and interest from December 1, 1913, at seven per cent per annum, less the payments made by defendant Rice Mills, Inc., leaving the amount of the judgment at \$4,795, provided if defendants, or any of them, should pay the balance due on said mortgage in the sum of five hundred dollars and interest falling due December 1, 1915, such amount shall be deducted from said sum of \$4,795; that plaintiff is entitled to a vendor's lien upon said lands and premises, and that the same be foreclosed and the property sold to pay said sums, but no deficiency judgment to be docketed. Judgment followed accordingly.

Plaintiff was engaged in merchandizing in the town of Biggs and purchased the property in question from the California Fruit Canners' Association November 30, 1912, the consideration being two thousand five hundred dollars, of which five hundred dollars was paid about the time of purchase and the balance was to be paid in installments, for which promissory notes were given of five hundred dollars each, payable as shown in the mortgage mentioned in the pleadings and findings. At the time there was an old building on the land, very much dilapidated and of little value in its then condition.

Charles E. Hale Company, a corporation, was carrying on a wholesale grocery and bakers' supply business in San Francisco and conceived the plan of establishing a rice milling establishment at the town of Biggs. To this end this company entered into negotiations with plaintiff to lease, with the privilege of purchasing from him, the said premises. These negotiations took written form in the three instruments above referred to, the first dated September 2, 1913, which was a lease with an option to purchase; the second and third

were instruments dated September 5, 1913, by which plaintiff agreed to convey the property to the Charles E. Hale Company, the lease being made part of the agreements by reference. It appeared that the original proposition to plaintiff was that the Rice Milling Company should be incorporated for fifty thousand dollars, on which, as a basis, plaintiff was to have stock of the par value of five thousand dollars. It was later decided to capitalize the company at one hundred thousand dollars and plaintiff was given stock of the par value of ten thousand dollars. On September 24, 1913, pending negotiations, plaintiff wrote the Hale Company requesting it to make the sale a cash transaction, the letter reading: "In looking over the papers and before returning them to you, we would ask if the Chas. E. Hale Co. has passed a resolution authorizing their secretary to sign the various papers that have been submitted to us. We are not attempting to stall you at all, but it is better to get this right than to attempt to correct it later. Also, would it be agreeable to you to make a cash price on the building should anything happen that would make it practically impossible for us to continue as we now expect to? I am suggesting this as many things may happen in twenty-four months, and submit it to you for your approval or disapproval, as the case may be." On September 29, 1913, Hale Company replied as follows: "Referring to your letter of the 24th inst. in which you asked if it would be agreeable to come to some agreement as to a cash price on the building, it will be quite impossible to take up a subject of this kind by correspondence." On September 30, 1913, plaintiff wrote the Hale Company again, stating: "Before returning you the papers asked for by Mr. Barnard this morning, I would like to insert the following: ('or W. M. Doty is to receive cash for the above mentioned cannery building and grounds, to the amount of \$5000.00; he to have the right of accepting either proposition.') Will you kindly instruct me to have the above inserted in the agreement over our signatures, and oblige yours very truly." On October 1, 1913, the Hale Company replied, repeating the request made by plaintiff: "Beg to say we cannot see our way clear to allow you this privilege at this time and consequently your request is respectfully declined. Please deliver the three documents you have in your possession to our Mr. W. E. Barnard on demand, and by so

doing very much oblige, Yours truly," and on September 22, 1913, a certificate for one hundred shares of the Rice Milling Company stock was issued, signed by Chas. E. Hale, president, and Geo. F. Braun, secretary, which recited that "W. M. Doty is the owner of one hundred shares of the capital stock," etc. This certificate was placed in escrow in the Sacramento Valley Bank at Biggs, on or about September 25, 1913, with instructions reading as follows: "To be indorsed by Mr. W. M. Doty, opened, to be held in escrow by Bank until mortgage is paid off by W. M. Doty on Cannery Property, then stock to be turned over to W. M. Doty," signed, "California Rice Milling Co., by George F. Braun, Secretary." Plaintiff went to the bank and indorsed the certificate, leaving it there with the escrow memorandum, and, to conclude the transaction, plaintiff, on December 1, 1913, executed and delivered his deed to the Rice Milling Company of the said premises, and the Milling Company went into possession and at once commenced preparing the building for its contemplated uses and the installation of the necessary rice milling machinery. The improvements of the building cost \$7,551, and the testimony of Mr. Hale was that the Charles E. Hale Company had "put in twenty-six thousand dollars actual money," and were responsible for the machinery purchased, making in all about forty-two thousand dollars contributed by the Hale Company in establishing the plant.

The Rice Milling Company operated the plant about eleven months and until about the middle of November, 1914, and, as stated in respondent's brief, "had built up and established in the vicinity a fairly thriving rice milling business."

Before advancing to the second phase of plaintiff's investment, it is perhaps best that we should at this point determine whether or not the finding that respondent conveyed the property for the price of five thousand dollars to be paid him by the Rice Milling Company is supported by the evidence. It is challenged by appellant, whose contention is that the sole consideration for the conveyance was the shares of the Rice Milling Company's stock. It is not claimed by respondent that any false or misleading representations were made to respondent by any of the promoters of the enterprise, or that there was any fraud in any form practiced upon him, or that any advantage was taken of his ignorance of the promoters' in-

tentions. There was no agreement or representation that the stock of the proposed company should have or continue to have any specified value. Plaintiff seems to have been informed of the object they had in view from the beginning of the negotiations. There is nothing in the language of the instruments, nor in the circumstances surrounding the transaction, nor in the conduct of the parties to warrant the conclusion that a cash payment was contemplated. Had such been the intention of the parties, the natural thing to have done would have been to so express it in some unmistakable written form. They were all men of experience in business affairs and presumably capable of expressing their intention in simple and plain English in a matter such as this—simple and plain as it was. The enterprise was a legitimate and promising one, and was to be inaugurated and built up at respondent's place of residence and in what was known to be a rice-producing neighborhood. The testimony of plaintiff and Mr. Hale was that at its inception the only property or assets the Milling Company had was the land conveyed by respondent to the Milling Company, which respondent valued at five thousand dollars. At that time the value of the company's shares, beyond the value of the land, was purely prospective and depended on the installation of a plant of sufficient capacity, which the Hale Company was to erect, and did erect, and its successful operation. It represented, when completed, an investment, including the land, of about fifty thousand dollars, and according to respondent's contention his shares represented a value of about five thousand dollars. The value of these shares is, perhaps, not material if the transaction was as respondent contends, and as the court seems to have found, that the sale of the land was for five thousand dollars, to be paid in money, and that the shares issued were but evidences of the company's indebtedness for that amount.

We must look to the written agreements to ascertain what the transaction was, for the negotiations ultimately found expression in them. The provision relied upon is found in the agreement of September 5, 1913, mentioned above as defendant's exhibit "B," which is that plaintiff will convey to Charles E. Hale Company, or assigns, the property in question, "to the value of five thousand (\$5000) dollars, in full paid-up stock in the said Rice Milling Company of the party of the second part; said fully paid-up stock to be one hundred

shares with a par value of one hundred (\$100) dollars per share based on incorporation of one hundred thousand dollars." We find ourselves unable to give these agreements a construction that would justify a finding that the Charles E. Hale Company or the Rice Milling Company, as its assigns, agreed to pay plaintiff five thousand dollars in money for the property. Plaintiff sought by his letters of September 24th and 29th, noticed above, to have this very provision placed in the agreements as optional with him, but it was expressly refused, and he allowed the shares which had been issued in his name, pursuant to the agreement and with his indorsement of the certificate, to remain in escrow as security for his payment of the mortgage debt resting on the property, the escrow agreement being that the certificate was to remain until the "mortgage was paid off by W. M. Doty on cannery property, then stock to be turned over to W. M. Doty."

Respondent's right to a vendor's lien is to be derived, if at all, from section 3046 of the Civil Code, to wit: "One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer." Obviously, if the price for the property was paid by the issuance to respondent of said shares, the statute does not apply. Respondent contends that he never was a stockholder in either company; that he never was permitted to have any stock. Appellant contends that under the agreement by which respondent became entitled to one hundred shares of stock for his property, he became a fully paid vendor. Authorities are cited to the effect that the agreement to issue stock for the property constituted the respondent a stockholder. For example, in *Cook on Corporations*, section 52, it is said: "Any agreement by which a person shows an intention to become a stockholder is sufficient." Again at page 28: "Issuance of the certificates of stock is not necessary to constitute one a stockholder or owner of shares in a corporation."

In *Garretson v. Pacific Crude Oil Co.*, 146 Cal. 184, 188, [79 Pac. 838, 840], the court said: "The fact that the Corbin shares were not issued until after other shares had been issued is immaterial, for the Corbin stock passed upon the completion of the agreement by which the consideration was conveyed to the corporation. Nothing remained to be done but the formal issuance of the certificate, upon which the ownership

of the stock did not depend." (See, also, *Mitchell v. Beckman*, 64 Cal. 117, 121, [28 Pac. 110].) Here, however, the stock was in fact issued. Respondent says: "Such is the law, but that law has no bearing upon the case at bar. Here we are dealing with this corporation, which so far as it was concerned never permitted respondent to have any stock. In fact, it was contemplated that he wouldn't have such stock until December 1, 1916, when the last installment of the mortgage indebtedness must be paid." The escrow agreement was part of the transaction. Respondent was to convey the property free from encumbrance. There was a mortgage indebtedness resting upon it and by agreement his shares were placed in escrow as security for his performance and to be delivered to him upon performance. He could at any moment have demanded and would have received the certificate upon payment of the mortgage debt. Respondent interposed no objection to this disposition of the stock, nor could he, since the use made of it was for no other purpose than to secure the performance of his obligation and was apparently with his consent.

What was said in the case of *Greenberg v. California Bituminous Rock Co.*, 107 Cal. 667, [40 Pac. 1053], would seem appropriate in this case: "The corporation did not guarantee that the stock should always have a value equal to the then actual or estimated value of the land, or that, if the stock should decline in value, they should be paid in money or have a vendor's lien as for a money consideration. It certainly could not have been the intention that these parties should sell their land to the corporation for a definite number of shares of its capital stock, and that they might leave their stock unissued in the hands of the corporation, so that if the corporation was prosperous, and its stock valuable, that they would then take it, but if the corporation became involved, they might possibly escape liability as stockholders by refusing to take it upon the ground that the stock was not of the value they contracted for, but hold the land as security for its alleged value by a proceeding to foreclose a vendor's lien."

We come now to the second phase of the transaction. In the early part of November, 1914, the Rice Mills, Inc., or second company, as it is sometimes called, was incorporated. Its articles were filed with the county clerk of the city and county of San Francisco on November 5th, and on the 6th were filed with the Secretary of State. This corporation was organized



with a capital stock of two hundred and fifty thousand dollars in shares of one hundred dollars each. Its objects were the same as those of the old company and it was organized to take over its property. The incorporators, with the exception of Chas. E. Hale, were different persons from those who organized the old company and the president and secretary were not the same. The old company conveyed its property and assets to the new company, the consideration being that the new company assumed the liabilities of the old company and in addition transferred to it 420 shares, of the par value of forty-two thousand dollars, of the new company. On this subject Mr. Hale testified as follows, and it was not disputed: "I explained to Mr. Doty that I thought the new corporation being one of more financial strength, the stock in that would be much more desirable than the one in the old company, which was not so strong financially, and that the exchange looked to be an advantageous one for the stockholders in San Francisco of the old company. We wanted to present the matter to him; I had brought Mr. Glass and Mr. Lilly with me to explain the matter to him, to ask him if he looked at it in the same light, and if he did, to enter into the agreements we had done in San Francisco, to carry out the project of having the new company, which had already bought the Pacific Rice Milling Company of San Francisco, also buy the mill at Biggs; if he felt that was a good thing to do we would like to have him join us, and we were waiting his decision of the matter, as he was stockholder in the old company, and after going over the subject several hours, and, as I recollect it, asking all the questions relating to it, he thought that it would be a good thing to do and consented, and signed the contract and also gave me the proxy to take back with me to San Francisco to vote in favor of it at a called meeting of the directors of the old company."

While the negotiations were pending, plaintiff executed and delivered the following agreement, referred to by Mr. Hale in his testimony:

"California Rice Milling Co.,

"Biggs, Cal., Nov. 2nd, 1914.

"To whom it may concern:

"Agreement in duplicate.

"I, W. M. Doty, of Biggs, California, agree on demand to the transfer of my one hundred shares (par value \$10,000)

of the California Rice Milling Company (Inc.) stock, now held in escrow by the Sacramento Valley Bank of Biggs, Cal., for an equal amount of the paid-up stock in the company of the prospective purchasers of said California Rice Milling Company.

“W. M. DOTY.

“In consideration of the above transfer, the California Rice Milling Company agrees to waive all assessments and or other liabilities prior to the transfer of stock from the old into the new company.

“CALIFORNIA RICE MILLING COMPANY (Inc.),

“Per CHAS. E. HALE, Prest.”

On the same day, plaintiff delivered to Mr. Hale the following proxy:

“Know all men by this writing: That I, W. M. Doty, hereby appoint Chas. E. Hale my proxy to vote in my place at a called meeting of the stockholders of the California Rice Milling Company to be held on the — day of November, 1914, at San Francisco, California, and at any adjourned meeting thereof according to the number of votes I would be entitled to if I were personally present, without power of substitution or revocation. This proxy shall continue in force until December 1st, 1914.

“Witness my hand this second day of November, 1914.

“W. M. DOTY.”

By quitclaim deed of date November 13, 1914, plaintiff conveyed the said premises to California Rice Mills, Inc. On November 16, 1914, the new company issued, as a part of the 420 shares it had agreed to issue to the old company, certificate No. 6 to plaintiff, and as the said mortgage indebtedness of plaintiff was still unpaid in part, this certificate was placed in escrow with the other certificate and plaintiff indorsed it as he had indorsed the first certificate. The Rice Milling Company conveyed the said premises and appurtenances to the Rice Mills, Inc., on November 12, 1914. The new company operated the plant for six or eight months, when it failed and shut down. The evidence was that the Johnson-Locke Mercantile Company, the owners of a majority of the stock of the new company, had undertaken to finance the new company. failed, and carried the Rice Mills, Inc., or new company, with it. It would seem unnecessary to trace the misfortunes of the

new company. This company took over the property under the agreements entered into by plaintiff with the old company and its deed. The old company proceeded to wind up its affairs preparatory to dissolution and was finally dissolved by decree of court, and presumably its obligations to creditors were satisfied, otherwise it could not have secured the decree. Admittedly, however, there was nothing left for the stockholders, and it is conceded that the stockholders in the new company are in like situation. The court found that at the time appellant acquired the property, it had full knowledge of all plaintiff's rights therein. Plaintiff never at any time, before bringing the action, claimed a vendor's lien. Defendants endeavored to show by the officers of both the old and new company that they had no knowledge or notice that such a claim was made by plaintiff. The court sustained objections to this line of inquiry erroneously, we think, for the pleadings raised the issue whether appellant was a purchaser for value without notice. The finding, however, is that appellant purchased with knowledge "of all plaintiff's rights," but does not specify what those rights were. So far as the existence of a right to a vendor's lien is concerned, the only right respondent had must be traced to the agreements already disposed of. If the finding refers to respondent's right arising out of these agreements and means that appellant had notice of these agreements and of such rights as they carried, the finding is supported. But we have seen that no vendor's lien arose out of these agreements with the Rice Milling Company, and it seems to us equally clear that no vendor's lien arose by reason of the transfer of the Rice Mills, Inc., or from respondent's relation to the latter. Plaintiff gave his written consent to the transfer of his shares in the old company for an equivalent in the new company; he appointed Mr. Hale as his proxy to vote these shares in the new company; he indorsed the certificate and left it in the bank to take the place of the share he held in the old company, and he conveyed by deed to the new company his interest in the premises he now seeks to have charged with a vendor's lien. The negotiations and their culmination in making plaintiff a stockholder in the new company appear to have been free from fraud, misrepresentation, or mistake; indeed, nothing of this sort is alleged or claimed.

Appellant contends that, if it can be said that a vendor's lien ever existed, "it has been waived time and again," and

especially "by the execution of a deed by the vendor to a subpurchaser." We do not think it necessary to consider the question of waiver. We feel quite satisfied that, for the reasons above given, no vendor's lien arose out of the transaction, and that the findings of facts from which the learned trial court reached the conclusion that such a lien did arise in plaintiff's favor are without support in the evidence. We are further satisfied that the evidence does not support the finding that plaintiff sold and transferred the property to the Rice Milling Company "for the price or consideration of five thousand dollars to be paid to him by said defendant California Rice Milling Co.," and that the judgment for said sum is without support.

The judgment is, therefore, reversed.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 1, 1918.

---

[Civ. No. 1796. Third Appellate District.—June 5, 1918.]

WONG AH SURE, Appellant, v. TY FOOK, Respondent.

APPEAL—ALTERNATIVE METHOD—RECORD—PRINTING IN OPENING BRIEF.

Where an appeal is taken under the alternative method, it is the duty of the appellant to print in his opening brief such portion of the record as he desires to call to the attention of the appellate court, and it is not proper procedure to omit to do so and discuss the evidence in the reply brief.

VENDOR AND PURCHASER—ORAL CONTRACT FOR SALE OF LAND—DESTRUCTION OF PROPERTY—RECOVERY OF MONEY PAID.—Where a purchaser of land under an oral contract goes into possession and makes a part payment and agrees to pay the balance at a future date, when the property is to be conveyed to him and before the time for payment the building on the land is destroyed by fire, the purchaser may rescind and recover the money paid, since the contract is not an executed one under section 1661 of the Civil Code.

APPEAL from a judgment of the Superior Court of Placer County. J. E. Prewett, Judge.

87 Cal. App.—80

The facts are stated in the opinion of the court.

J. M. Fulweiler, for Appellant.

Meredith, Landis & Chester, for Respondent.

CHIPMAN, P. J.—This is an action to quiet title to certain land, being a portion of section 19, township 12 north, range 8 east, near the town of Newcastle, and for other relief. Defendant filed an answer and cross-complaint: Denied that plaintiff was at the commencement of the action or is now the owner of the land, “except as hereinafter set forth”; denied that defendant claims an interest in the whole of said premises, but avers that he claims an interest in a certain portion hereof (describing it); denied that defendant’s claim is without right. By way of cross-complaint, alleged: That about the — day of March, 1914, plaintiff and defendant entered into an agreement whereby “defendant agreed to buy and plaintiff agreed to sell the following described land and premises” (description), the consideration being \$950, payable four hundred dollars May 20, 1914, and the balance within six months from said last-mentioned date; that defendant went into possession and has ever since been and now is in possession; that about June 22, 1914, a store building situated on said premises was partially destroyed by fire; that immediately thereafter it was agreed by plaintiff and defendant that defendant should cause said store building to be repaired “at the sole expense and cost of plaintiff and the amount of the said cost to be charged against and deducted from said purchase price of said land”; that defendant has paid to plaintiff the entire consideration, to wit: May 20, 1914, paid cash four hundred dollars; July 17, 1914, paid out for cost of repairing said store building, \$505; sold and delivered to plaintiff merchandise of the reasonable value of forty dollars, and paid plaintiff the sum of fifty dollars in cash, making in all \$995; that defendant has demanded of plaintiff “that he execute and deliver to defendant the said deed conveying said land and premises to defendant in accordance with said agreement,” but plaintiff has refused, and still refuses, to comply with said demand. The prayer is that plaintiff take no relief; that plaintiff be required to specifically perform said contract; that it be decreed that plaintiff has no estate or interest in said premises and

that he be debarred from asserting any claim in or to said land.

Plaintiff answering the cross-complaint: Denied that plaintiff agreed to sell to defendant the strip of land described in said cross-complaint, except a strip described as follows (description), on which "there was a building and porch of the dimensions heretofore stated of 19x70"; that said agreement "was not in writing but oral and the price to be paid was \$950, payable four hundred dollars cash and the balance within a reasonable time thereafter and not to exceed one year, and at said final payment a deed was to be made to defendant"; plaintiff admits that he surrendered possession to defendant and that while defendant was in possession "the upper or wooden portion of said building was destroyed by fire, but for which plaintiff was in no respect responsible or liable"; denied that it was agreed that said building should be repaired at plaintiff's cost; admitted the payment of four hundred dollars cash, but alleged that plaintiff let defendant "have back" from said four hundred dollars the sum of \$175, leaving due \$625; denied that defendant sold plaintiff merchandise of the value of forty dollars or any other sum, or at all, and denied that defendant paid plaintiff fifty dollars in cash or any sum in excess of forty dollars; denied that defendant has demanded of plaintiff a deed, and alleged that plaintiff has tendered to defendant a sufficient deed on payment of the unpaid balance of said purchase price. Plaintiff prays that it be adjudged that defendant has no interest in said land and that plaintiff have a vendor's lien on said premises as security for the payment of said balance due plaintiff.

The cause was tried by the court without a jury and findings of fact were made by the court substantially in accordance with defendant's answer and cross-complaint; and as conclusions of law the court found that plaintiff is entitled to a decree quieting his title to the strip of land claimed by him, except that portion particularly described as claimed by defendant and as to such portion that defendant is the owner and entitled to possession; that defendant is entitled to the decree that plaintiff convey the said strip of land to defendant.

Judgment was entered accordingly. Plaintiff appeals from the judgment and brings the record here under the alternative method.

It is stated in appellant's brief that pending the appeal plaintiff, Wong Ah Sure, conveyed his interest in the premises to Sing Kee Jan and later died, and Sing Kee Jan has, upon suggestion of counsel, been substituted as appellant.

Respondent invites attention to the failure of appellant in his opening brief to comply with the provisions of section 953c of the Code of Civil Procedure, and asks that the rule be enforced, which is to affirm the judgment without examining the typewritten transcript in search for error upon which to base a reversal. In the present instance, there was an entire disregard of the requirements of the code section. Appellant, however, has made a fairly successful effort to comply with the statute in his reply brief. The statute reads: "In filing briefs on said appeal the parties must, however, print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court"; and appellant makes the point that the statute does not require compliance therewith in the opening brief, and that he has sufficiently complied with the statute by calling attention to the portion of the record on which he relies in his reply brief.

It is due to the respondent that the appellant should state fully his points and authorities in his opening brief and if he challenges the sufficiency of the evidence to support the findings, he should in his opening brief point out the evidence which he claims should have demanded a different finding. Of course, if the claim is made in good faith that there is no evidence whatever in support of a particular finding, a statement of such fact would be sufficient and the duty would then devolve upon the respondent to point out the evidence. The respondent is entitled to know on what points appellant relies and they should be stated in the opening brief in order that he may meet them in his answering brief. The practice of allowing appellant to reserve his discussion of the sufficiency of the evidence to support the findings to his reply is illogical and devolves upon the respondent the necessity of filing an additional brief, which would be unnecessary where appellant complies with the statute in his opening brief. Orderly procedure precludes appellant from making new points in his reply, and to defer compliance with the statute until he files his reply brief is in effect introducing an entirely new point which respondent could not anticipate and answer in his an-

swering brief. For these, among other reasons, we think appellant has not complied with what we believe to be the intention of the statute. As the question has not hitherto arisen, we have treated the reply brief of appellant as sufficient compliance with the statute.

Appellant states in his opening brief, and reiterates it in his reply brief, that "there is really but one issue to be determined in the case, and that is the 'agreement or contract to pay for the rebuilding of the store.'" The finding of the court is "that immediately upon said fire occurring and said damage and detriment resulting to said structure, building and improvement, as in these findings heretofore found, plaintiff agreed with defendant to alone stand and bear said loss, and agreed with defendant that, if defendant should restore said structure, building and improvement and pay the cost therefor, the amount paid therefor should be deducted from the final payment to be paid by defendant to plaintiff, as in these findings elsewhere found, for said land, premises, structure, building and improvement in these findings elsewhere described." Also, "the court finds that the risk of loss and destruction of said structure, building and improvement on said land and premises agreed to be sold and conveyed by plaintiff to defendant was on the plaintiff and that the damage and injury to said structure . . . by reason of fire occurred . . . without the fault, omission or negligence of the defendant."

It appeared that defendant went into possession of the premises under an oral contract of sale. Part payment was made, the balance to be paid at a future date, and when and not until paid, plaintiff was to convey the premises to defendant by a good and sufficient deed of bargain and sale. Before the time had arrived for payment of deferred installments, the building was partly destroyed by fire. As we understand the cases of *Potts Drug Co. v. Benedict*, 156 Cal. 322, 334, [25 L. R. A. (N. S.) 609, 104 Pac. 432], and *Conlin v. Osborn*, 161 Cal. 659, 666, [120 Pac. 755], defendant could have rescinded and recovered the money paid on account of the purchase price. The principle applicable to the situation is stated in the *Potts Drug Co.* case: "Where there is a mere agreement to sell, and title therefore has not passed, the loss falls on the vendor." Appellant answers that the sale was not an executory contract, but was an executed agreement. "An executed



contract is one, the object of which is fully performed. All others are executory." (Civ. Code, sec. 1661.) The contract was taken out of the statute of frauds by part payment of the purchase price and delivery of possession. The agreement was partly executed but title had not passed to defendant. There was evidence that the value of the building was about \$800 or \$850 and the value of the lot \$150. It is obvious that the property for which defendant was to pay \$950 consisted principally of the building. The fact that he went into possession does not make the rule any the less applicable. It became impossible, through no fault of defendant, for plaintiff to convey the property he had agreed to convey. "Where the contract relates to the use or possession or any dealing with specific things in which the performance necessarily depends on the existence of the particular thing, the condition is implied by the law that the impossibility arising from the perishing or destruction of the thing, without default in the party, shall excuse the performance, because, from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the subject of the contract." (9 Cyc. 631.)

But if this be not the law, the parties were certainly competent to agree as to which of them should bear the loss; and there was evidence that immediately after the fire occurred plaintiff told defendant to go ahead and repair the building and to deduct the cost from the unpaid purchase price for the property. We find no prejudicial error in any of the rulings of the court.

The judgment is affirmed.

Burnett, J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 1, 1918.

[Civ. No. 2208. First Appellate District.—June 6, 1918.]

SAM MOOSIOS, Respondent, v. LOUIS RUSCONI,  
Appellant.

**CONVERSION—LEASE OF FARMING LAND ON SHARES—SEIZURE OF WHOLE CROP BY LESSOR—LIABILITY TO MORTGAGEE OF LESSEE.**—Where land is leased to be farmed on equal shares, and the lessor attaches and takes possession of the whole crop, and personally and through the sheriff refuses upon demand to deliver the other one-half thereof to the holder of an overdue note secured by chattel mortgage on such one-half with the right of possession upon failure to pay the note, such lessor is guilty of conversion.

**APPEAL** from a judgment of the Superior Court of Fresno County. George E. Church, Judge.

The facts are stated in the opinion of the court.

George Cosgrave, for Appellant.

N. Lindsay South, C. K. Bonestell, and G. Laynesworth, for Respondent.

**KERRIGAN, J.**—This is an action brought by the plaintiff against the defendant for conversion of a lot of beans upon which plaintiff held a chattel mortgage. The trial court found against the defendant and rendered judgment in plaintiff's favor for the sum of seven hundred dollars, the value of the beans found to have been converted.

The defendant leased a parcel of land in Fresno County to Harry Sidery, Y. Colivas, and Louis Fatseas, mortgagors of the plaintiff, to be farmed on equal shares. In addition to receiving one-half of the crop, the defendant was to be reimbursed for any advances he might make to his lessees for the purpose of enabling them to produce and harvest the crop, this reimbursement to be made out of the lessees' share thereof at the time it was harvested, at which time also the defendant was to receive from the lessees his share thereof due as rent. Just prior to October 28, 1915, plaintiff and defendant apparently became apprehensive as to how the crop of beans would be divided, and on the forenoon of that day the plaintiff obtained from the lessees a promissory note for \$750, payable

one day after date, for supplies and advances furnished them, the note being secured by a chattel mortgage on the crop, and providing that if not paid when due, the mortgagee should be entitled to possession of the mortgaged property. On the afternoon of that day the defendant began an action against his lessees for recovery of the amount of advances made by him under the provisions of the lease, and the sheriff, acting under a writ of attachment issued in that action, and while the beans were yet on the vines, took possession of the same. Later he harvested the crop and delivered one-half thereof to the defendant. In the meantime, the note of the lessees to plaintiff being overdue and unpaid, the plaintiff demanded possession of one-half of the crop both of the defendant and of the sheriff. They refused to comply with this demand, and there is nothing in the record to show what became of the proportion of the crop to which, under the terms of his chattel mortgage, the plaintiff was clearly entitled. Prior to the trial defendant's attachment suit against the lessees was dismissed, upon the ground that it was prematurely brought, it appearing to have been instituted before the defendant was entitled either to his share of the crop or to repayment of advances claimed by him to have been made.

From a mere statement of the facts it appears too plain to require argument that, upon the failure of the lessees to pay to plaintiff the amount of their note, he, under the provisions of the mortgage already noticed, was entitled to the possession of one-half of the crop of beans, and that the defendant, making no claim to more than one-half the crop, having through the sheriff—who, in effect, was his agent—taken possession of the whole thereof, and having both personally and through the sheriff refused upon demand to deliver to the plaintiff the part to which he was entitled, was guilty of conversion. It follows that the conclusion of the trial court to that effect was correct.

The judgment is affirmed.

Beasley, J., *pro tem.*, and Zook, J., *pro tem.*, concurred.

[Civ. No. 1798. Third Appellate District.—June 6, 1918.]

**CITY OF PETALUMA (a Municipal Corporation), Respondent, v. ISABELLE HUGHES et al., Appellants.**

**STREET LAW — CITY OF PETALUMA — IMPROVEMENT UNDER STATE LAW — PRELIMINARY ORDINANCE ADOPTING PROCEDURE UNNECESSARY — CHARTER.**—In the doing of street work in the city of Petaluma under the provisions of the act of March 6, 1889 (Stats. 1889, p. 70), it is not necessary that the city, prior to entering upon the work, should adopt an ordinance electing to proceed under the state law and adopting its procedure as the one to be followed in making the improvement, as section 21 of article III of the charter, requiring that such work should be done by ordinance not in conflict with state laws, must be read in connection with section 68 of the same article, which provides that in the absence of any procedure for carrying out or effectuating any granted or implied power or authority, the general law of the state shall be followed.

**APPEAL** from a judgment of the Superior Court of Sonoma County. Edgar T. Zook, Judge Presiding.

The facts are stated in the opinion of the court.

W. T. Mooney, T. J. Geary, and C. W. Lynch, for Appellants.

G. P. Hall, and W. F. Cowan, for Respondent.

**BURNETT, J.**—This is an appeal from a judgment in favor of plaintiff and against certain defendants, arising out of certain condemnation proceedings undertaken by the city of Petaluma (a municipal corporation) for the widening and extending of a certain street within its corporate limits, the undertaking being commonly known as the "Douglass Street Extension."

It is the contention of appellants (1) "that the charter of the city of Petaluma does not contain a valid system providing for the opening of streets, but it permits the city authorities, by ordinance, to adopt such a system; that the city of Petaluma never adopted any system providing for the opening of streets, and is therefore without authority to proceed."

(2) Closely allied to this is the further claim that the said proceedings taken by said municipality are void *ab initio*, for

the reason that they have been undertaken and pursued under a general law of the state of California, to wit, the act of March 6, 1889 (Stats. 1889, p. 70), which has no application to said city of Petaluma, instead of having been undertaken and pursued, as the charter requires, as hereinbefore stated.

(3) Further, that "even if we concede (which we do not) that the city had the right to proceed directly under the general law without consideration for the charter provisions cited above, the proceedings as actually taken were defective, in that there was not a posting and not a publication of the 'Notice of Public Work' in the matter given as required by the act of March 6, 1889. This being true, the city never gained jurisdiction to order the work and improvement."

(4) Defendants also raise the point that they were restrained from offering any evidence as to the assessment side of the proceedings taken, and in support thereof quote *Los Angeles v. Dehail*, 97 Cal. 13, [31 Pac. 626].

(5) They further contend that the trial court "practically" prejudged the controversy, before its presentation, by the use of the following language:

"The Court: You have authority to act under the general law. The supreme court has expressly held in four different cases the general law is incorporated."

The first two contentions of appellants, virtually involving the same question, may be considered together, and it is probably sufficient to say that they have been answered by the district court of appeal for the first district in the case of *In re Thomas*, 33 Cal. App. 547, [165 Pac. 1021]. Therein the learned author of the opinion, referring to sections 21 and 68 of article III of the charter of Petaluma, says: "It seems clear to us, when these two sections of the city charter of Petaluma are read together, as they must be, that no preliminary ordinance was necessary to entitle the city authorities to proceed immediately under the state law in making the street improvement under review. The city charter did not itself embrace a procedure for the doing of such work; and the only requirement of section 21 of article III of its charter is that when this character of work is to be done, it should be done by ordinances not in conflict with state laws. The particular state law adopted by the city for the purposes of this work provides that the contemplated improvement shall have its inception in an ordinance of the city, for such

the resolution of intention is, as required by said state law. The passage of an additional ordinance by the city resolving to adopt this ordinance required by the state law would be doing of an idle act; and any construction of section 21 of article III of the charter which would require the doing of such act would do violence to the intendments of section 68 of article III of the same charter. We find no merit, therefore, in the appellant's contention in this regard."

A somewhat analogous case is *Park v. Pacific Fire Extinguisher Co.*, ante, p. 112, [173 Pac. 615], wherein it is said: "Street lighting is a municipal affair; but the charter of the city of Berkeley, while conferring power upon the city to adopt a complete procedure for the creation of a system of street lighting, does not contain such a procedure. This is conceded. The city has power to provide such general scheme; but not having done so, it is governed by general law in that respect and may in this case follow the provisions of the Improvement Act of 1911. (*Fragley v. Phelan*, 126 Cal. 383, [58 Pac. 923].)"

In the *Fragley* case it is said: "It is not within the constitutional power of the legislature, by approving a freeholders' charter which fails to make provision upon subjects pertaining to municipal affairs, to exempt that city from being subject to legislative control in reference to those subjects, nor can the city secure exemption from such control by omitting to make such provision in its charter."

The following cases are also opposed to these contentions of appellants: *Osburn v. Stone*, 170 Cal. 484, [150 Pac. 367]; *Clouse v. San Diego*, 159 Cal. 436, [114 Pac. 573]; *Hellman v. Shoulters*, 114 Cal. 156, [44 Pac. 915, 45 Pac. 1057].

Of course, it is fundamental that, in proceedings like this, municipalities can act legally only in strict compliance with the requirements of the statutory law, defining their activities, or to put it in the language of the decisions, that the mode is the measure of their power.

In the case of *City of Napa v. Maxwell*, 36 Cal. App. 103, [171 Pac. 839], the court uses the following language: "Of course, the rule is that proceedings for the improvement of streets are *in invitum* and purely statutory, and afford no opportunity for invoking any of the principles of equity, and the validity of an assessment, therefore, depends upon a statutory power, and the party seeking the right to enforce

it must show that the statutory power has been strictly followed."

Therein, the proceedings were declared invalid because two commissioners, instead of three, were appointed as provided for by section 6 of the act of 1889, to ascertain the benefits accruing or the damage resulting to property affected by the proposed improvement.

But in the instant case no such consideration is involved. Section 2 of said act of 1889 provides: "Before ordering any work to be done or improvement made which is authorized by section one of this act the city council shall pass a resolution declaring its intention to do so, describing the work or improvement and the land deemed necessary to be taken therefor and specifying the exterior boundaries of the district of lands to be affected or benefited by said work or improvement, and to be assessed to pay the damages, cost and expense thereof." Then follows a section requiring the street superintendent to post a notice of this resolution and also to publish it for ten days in a daily newspaper. The only asserted defect as to this proceeding is pointed out in the opening brief of appellants by quoting from the transcript, as follows:

"Mr. Geary: 'It may be stipulated that all the proceedings which are set out in the complaint as having been taken by the council of the city of Petaluma were in fact taken by them.'

"The Court: 'With the exception of the fact, for a portion of the time of publication, the word "Stratton" appeared in the notice instead of the word "Harriman," and that there were not ten full days of posting or publication of the word "Harriman" in there.'"

There is nothing therein to show that respondent consented to the statement of the court, and, besides, if it be regarded as a stipulation of the city of Petaluma, it is entirely unintelligible. It does not appear what difference it made whether the word "Stratton" or "Harriman" was used. It was incumbent upon appellants to set out in their brief the portions of the transcript upon which they relied to show error, the appeal being under the alternative method. (*Scott v. Holly-wood Park Co.*, 176 Cal. 680, [169 Pac. 379].)

They should have exhibited the evidence in their opening brief, in order that respondent might have an opportunity to make suitable reply. They waited, however, until the filing of their final brief to call the attention of this court to the

entire proceeding in reference to said publication. But the record as exhibited in this final brief does not aid appellants in any manner. It does not show that the word "Stratton" or the word "Harriman" affected in the slightest degree the accuracy or sufficiency of the description of the property. As far as anything to the contrary appears, either word might have been used throughout, or both eliminated, and the full and definite information required by the statute still be contained in said publication. In other words, from the record we must assume that the clerical error was entirely immaterial and resulted in no prejudice whatever. Of course, no one would contend for the absurd proposition that an immaterial and unimportant change in the phraseology of the notice would invalidate it, the facts stated remaining essentially the same and corresponding with the requirements of the law. As to this we may adopt the language of the supreme court of Montana in reference to the publication of a notice of contemplated changes in the constitution, reported in *State v. Alderson*, 49 Mont. 414, [Ann. Cas. 1916B, 39, 142 Pac. 216], as follows: "Indeed, to reach the very acme of absurdity, we need only say that the rule of literal compliance requires that every word be spelled correctly, and if in the last illustration the printer inadvertently omitted the letter 'a' from the word 'measure,' and this was the only departure, the amendment would fail under the rule in question. A court which would nullify the expressed will of the people upon such a flimsy pretext as the one illustrated above would deservedly forfeit every claim to the respect or confidence of the community."

The case of *Ferri v. City of Long Beach*, 176 Cal. 645, [169 Pac. 385], has no application to this case. The notice therein contained the misstatement of a matter of fact. We, of course, agree that "where the statute prescribed a certain kind of notice, a court is not justified in saying some other kind of notice would be equally effective." It would be absurd to contend that notice, for instance, by mail, would answer the requisite of newspaper publication or notice by posting, but, in the instant case, no such question is involved.

As to the fourth point, it is sufficient to say that appellants' brief sets forth nothing from the transcript inviting attention even. However, the reading of the entire record discloses no such ruling as they claim. The case seems to have been tried



with exceeding care and fairness, and appellants have no just cause for complaint.

The charge that the trial judge had prejudged the cause seems particularly unfounded. The accusation apparently arises from the fact that he manifested a knowledge of the essential legal principles involved, and announced during the progress of the trial that the supreme court had made a certain decision in reference thereto. It is certainly somewhat novel that the familiarity of the trial judge with the law—however unusual it might be considered—should be the basis for criticism or animadversion.

Appellants suggest some other alleged errors, but they are not argued, and we pass them by without further notice.

The appeal seems to be entirely destitute of merit, and the judgment is affirmed.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 5, 1918.

---

[Civ. No. 2169. Second Appellate District.—June 6, 1918.]

DORAN, BROUSE & PRICE (a Corporation), Respondent, v  
HENRY COWELL LIME & CEMENT COMPANY (a  
Corporation), Appellant.

**CONTRACT—SALE OF CEMENT—QUALITY—SATISFACTION OF ENGINEER OF HIGHWAY COMMISSION.**—Where a letter ordering cement provided that the cement should comply with inclosed specification of the highway commission and be acceptable to their engineer, and in reply thereto the letter of the seller stated that the cement “will easily meet the specifications of the commission,” after which communications passed relating to the price alone, the contract called for cement acceptable to the engineer.

**ID.—EVIDENCE — TERMS OF CONTRACT — PRELIMINARY NEGOTIATIONS.**—Where a contract for the sale of cement consisted of letters and telegrams, it was error to admit oral evidence as to the terms of the contract and of the negotiations leading up to the same, but

such error was harmless where the letters and telegrams clearly showed the contract.

**ID.—RECOVERY FOR BREACH OF CONTRACT—REJECTION OF CEMENT BY HIGHWAY COMMISSION INSUFFICIENT.**—Where a contract for the sale of cement provided that the cement should meet the specifications of the highway commission and be acceptable to their engineer, the mere rejection of the cement by the commission, apart from the question of its quality, was not a compliance with the contract by the buyer, and, while a rejection by the engineer would be *prima facie* conclusive, such decision could be impeached for gross mistake amounting to fraud.

**ID.—PLEADING—INSUFFICIENT COMPLAINT.**—In action for breach of contract to deliver cement conforming to the specifications of the highway commission and acceptable to its engineer, the plaintiff cannot recover on the theory of the rejection of the cement by the engineer where the only allegation in the complaint was that the cement had been rejected by the highway commission.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. L. T. Price, Judge Presiding.

The facts are stated in the opinion of the court.

H. F. Chadbourne, Ward Chapman, and L. M. Chapman,  
for Appellant.

Jones & Weller, and John T. Jones, for Respondent.

**CONREY, P. J.**—Action to recover damages for breach of contract. The defendant appeals from the judgment.

By means of letters and telegrams passing between the plaintiff and the defendant, the terms of the contract were settled in writing. In a letter sent by the plaintiff to the defendant under date of August 11, 1909, the plaintiff said: "As the result of the irresistible persuasive powers of your Mr. Guthrie, kindly ship us as promptly as possible eight hundred (800) barrels of Mt. Diablo cement. . . . This cement is to comply with the inclosed specification of the Los Angeles County Highway Commission, and to be acceptable to their engineer." Then followed a statement concerning prices and payments. In the reply of defendant, the defendant said: "Yours of the 11th at hand and in reply beg to say that our cement will easily meet the specifications of the Los Angeles County Highway Commission." Then followed a statement

somewhat different from that of the plaintiff in its letter concerning prices and freight payments. To the defendant's letter the plaintiff replied by telegram under date August 17, 1909, as follows: "If you desire order fill according to our letter; if not cancel same. Wire reply." The defendant replied by telegram as follows: "Can fill order as per ours fourteenth and will prepay." The defendant at the same time sent to the plaintiff a letter concerning said telegram, by quoting it and saying as follows: "We now confirm same. The only difference between us is that there is a delivered price Ivy instead of a Los Angeles price plus a local out and so we thought best to wire you as above."

The plaintiff had a contract with the Los Angeles County Highway Commission for certain paving and concrete work on a road in that county, and purchased the cement for the purpose of using it in the performance of that contract. The specifications referred to in the plaintiff's first letter to the defendant were the specifications of the plaintiff's contract with the Los Angeles County Highway Commission. Those specifications, among other things, provided that "no material of any kind shall be used until it has been examined and approved by the engineer, and the decision of such engineer shall be final." The specifications further provided for the quality of the cement to be used by fixing a standard and a percentage which the cement must pass as compared with such standard.

Appellant admits that under the contract the quality of cement furnished was to be such as would meet the specifications of the highway commission, but contends that there was no agreement that it should be "acceptable to their engineer." It is our opinion that under the terms of the contract the cement was to be acceptable to the engineer. Defendant's first letter to the plaintiff evaded that question, but its letter in reply to the plaintiff's telegram covered the point by asserting that there was no difference between the two parties on the contract, except as to another matter. This is shown by the quotations given above. Appellant contends that the court erred in admitting oral evidence of the terms of the agreement, and in admitting oral evidence of the negotiations that led up to the making of the agreement for the purchase of the cement. We think that the evidence in question should not have been admitted, but our interpretation of the written con-

tract makes that error harmless, since upon the writings alone the point in question must have been decided against appellant.

Appellant next contends that the evidence is insufficient to support finding No. V of the court, wherein the court found "that the said cement so shipped to plaintiff as aforesaid did not comply with the specifications of the said Los Angeles County Highway Commission, in this, that the cement was not of the grade of fineness as required by said specifications, and the said cement and all thereof was rejected by the Los Angeles County Highway Commission, and plaintiff was not allowed to use the same on said work." The only testimony offered at the trial concerning the quality of the cement furnished by the defendant was testimony given by experts introduced as witnesses by the defendant. That testimony showed positively and without conflict that the cement was of the grade of fineness as required by said specifications. Therefore, in that respect, the evidence is not sufficient to support such finding.

Appellant's next contention is stated as follows: "The mere rejection of the cement by the Los Angeles County Highway Commission, or its engineer, is not sufficient to entitle the plaintiff to recover without a showing that the cement was in good faith tested according to the contract and found to be below the specifications." We agree that a rejection of the cement by the highway commission, considered apart from any rejection by the engineer, would not be sufficient without such showing of the facts concerning the quality of the cement. On the other hand, the terms of the specifications are such that a decision of the engineer rejecting the cement would have been *prima facie* sufficient. Such decision would have been final, unless impeached by facts showing fraud or gross mistake amounting to fraud. (*American-Hawaiian Eng. etc. Co. v. Butler*, 165 Cal. 497, 513, [Ann. Cas. 1916C, 44, 133 Pac. 616].)

But there is no allegation in the complaint that the cement contracted for was ever rejected by the engineer for the Los Angeles County Highway Commission. The only allegation on this point is contained in paragraph IV of the complaint, and is to the effect "that said cement and all thereof was rejected by the said Los Angeles County Highway Commission, and the plaintiff was not allowed to use the same on said

work." Neither is there any finding to the effect that the cement was rejected by the engineer. So far as appears from the findings, the engineer may have certified that the cement furnished by the defendant was fit to be accepted and the highway commission may have, wrongfully perhaps, refused to accept his decision. At all events, when the plaintiff in this action seeks to base its right of recovery upon a rejection of the cement by the highway commission, without any allegation or finding of its rejection by the engineer, the plaintiff cannot prevail without first showing that in fact the cement did not comply with said specifications.

The judgment is reversed.

James, J., and Works, J., *pro tem.*, concurred.

---

[Civ. No. 2173. Second Appellate District.—June 7, 1918.]

D. E. FERGUSON, etc., Respondent, v. JOHN D. MARSH,  
Appellant.

**CONTRACT—HAULING OF ROCK AND SAND—DEFAULT OF HAULERS—DEMURRAGE CHARGES—COSTS OF GASOLINE AND OIL—PRIORITY IN PAYMENT—RIGHT OF CONTRACTOR.**—Under a contract for hauling rock and sand, wherein the haulers agreed to save the contractor harmless from demurrage charges, and the contractor agreed to pay for all the gasoline and lubricating oil used in the hauling, the contractor had the right, upon the default of the haulers after permitting demurrage to accrue and contracting a bill for gasoline and oil, to first retain out of the sums due the haulers the amount of the demurrage charges.

**ID.—PAYMENT FOR GASOLINE AND OIL—NATURE OF CONTRACT.**—Under such a contract, the agreement to pay for gasoline and oil is not a contract made expressly for the benefit of a third person, which the seller of the oil could enforce.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. J. E. Barber, Judge Presiding.

The facts are stated in the opinion of the court.

J. Vincent Hannon, and T. G. Dalton, for Appellant.

W. J. Hittson, for Respondent.

**JAMES, J.**—The judgment in this case was in favor of the plaintiff. Defendant John D. Marsh has appealed therefrom.

In the year 1913 the defendant Marsh was the contractor named in a contract made with the state of California, which provided for the construction of certain road work on a public highway in the county of Los Angeles. In the prosecution of this work it was necessary that there should be used a large quantity of rock and sand. Appellant arranged for the procurement of the rock and sand, which was to be delivered in cars at several stations in the vicinity of the highway on which the work was to be done. Appellant then contracted with three persons, Anway, Bente, and Miller, to haul the rock and sand, as it arrived at these different stations, to the places where the same might be needed. This contract last mentioned was in writing, providing that Anway, Bente, and Miller should do all the work and furnish the tools, implements, motor trucks, and labor necessary for the expeditious handling of the cars and the delivery of the rock and sand. The contract also provided that Anway, Bente, and Miller should "save said first party [appellant John D. Marsh] harmless against any demurrage charges by reason of said cars remaining unloaded upon the track after delivery, it being expressly understood and agreed that said second parties shall upon the placing of said cars by the railroad at the said stations, or either of them, immediately proceed and with all due diligence accomplish the unloading of said cars, and expeditiously and with all due diligence deliver said rock and sand on the job as hereinbefore outlined, . . ." The contract further contained the agreement that Marsh "covenants and agrees to pay for all gasoline and lubricating oil used by said second parties in the operation of the motor trucks in the performance of this contract, deducting the amounts so paid by said first party for such gasoline and lubricating oil from the said contract price, and such payment to be considered as a payment on account of said contract price, . . ." Anway and his two associates entered upon the work of unloading and hauling the rock and sand and, after proceeding with this work for some days, they ceased their labors and abandoned their contract. During the time that they had been at work under the contract they incurred a debt of more than three hundred dollars for oils and gasoline which they purchased from the plaintiff. The plaintiff, before furnishing

the majority of the merchandise to the truck owners, saw the contract as made between appellant Marsh and Anway, Bente, and Miller. Failing to receive payment from the debtors, Ferguson presented his demand to Marsh and requested payment of the same. He also presented a written order made by Anway and Miller, requesting Marsh to pay the bill. The plaintiff here testified that when he presented the order and made demand, Marsh stated that Miller and Anway owed him (Marsh) for demurrage on cars amounting to five or six hundred dollars. This witness testified that Marsh said that if there was any money left he would settle the oil and gasoline bill. The plaintiff was asked the question: "Well, he told you he had money on hand belonging to Miller and Anway?" to which he replied: "Yes, sir; five or six hundred dollars, but he was going to take that out and pay this demurrage." While no date is fixed as that upon which the order was given, or this conversation had, it seems indicated from the testimony that the bill was not presented until after Anway and his associates had ceased work under the contract. The trial judge made his findings all in favor of the plaintiff, determining that at the time the demand was made upon the appellant Marsh there was sufficient money owing from the appellant to the hauling contractors to satisfy plaintiff's demand. This finding cannot be sustained on the evidence, unless it is to be determined that Marsh, in ascertaining the amount of money due to the hauling contractors, had not the right to offset demurrage charges. This because the testimony was uncontradicted to the effect that the demurrage charges, as claimed by the railroad company and as finally paid by Marsh, more than consumed the amount which was chargeable against Marsh by the haulers for work performed. A construction of the contract which would deprive Marsh of the right to adjust the debt of Anway et al. to him in ascertaining the state of the account would be most absurd and unjust. The contract expressly and particularly covered the matter of demurrage charges in favor of Marsh. Those demurrage charges constituted a necessary and proper item of credit which Marsh was entitled to deduct from the earnings of Anway et al. No term of the contract provided that the number of cars delivered should be limited or regulated in any particular manner, but the obligation of the haulers was to expeditiously remove the rock and sand from the cars when

they arrived. The witness Miller did testify that a great many cars arrived on one day and that he could not get the cars moved. It does not appear from the contract that Marsh assumed any duty as to the moving of the cars after they arrived, or the handling of them in any way. That was a matter that the haulers had exclusively in their charge, any inconvenience in the doing of which was to be endured by them.

That term of the contract whereby Marsh agreed to pay for oil and gasoline used by the haulers may not be said to be "a contract made expressly for the benefit of a third person, . . .," which under section 1559 of the Civil Code, may be enforced by the person in whose favor it exists. It has been repeatedly held that, while the particular party for whose benefit such a contract is made need not be named therein, it must appear by direct terms of the contract that it was made for the benefit of some particular party; and that this will not be implied from the fact that if the parties perform the contract strictly, it may operate incidentally to the benefit of the third person. (*Chung Kee v. Davidson*, 73 Cal. 522, [15 Pac. 100], second appeal in same case, 102 Cal. 188, [36 Pac. 519]. See, also, *Thomson v. Bettens*, 94 Cal. 82, [29 Pac. 336]; *Hamilton v. Bates*, 4 Cal. Unrep. Cas. 371, [35 Pac. 304].) In order to sustain the judgment it would be necessary to determine here, either that the contract to pay for oils and gasoline was a contract made expressly for the benefit of the plaintiff, or that when the order was presented by the plaintiff to Marsh requesting payment of the bill there was money resting to the account of the drawers of the order which Marsh would be required to pay. As a matter of law, the first proposition cannot be maintained; and, as we have indicated, the evidence was insufficient to sustain the finding of the court in the last particular. There were errors committed by the court in its rulings upon the introduction of evidence. It was incompetent for witnesses to be required to state orally what the terms of the contract were, because the same were expressed in writing and the obligations of the parties should have been ascertained from the writing itself which was very clear and explicit. Were the latter errors alone to be considered, however, it might perhaps be said upon the whole case that no prejudice resulted; hence we have given particular attention to those matters only which are most vital to a determination of the appeal. In our examination of the case we have not



had the benefit of brief or oral argument from counsel who represents the respondent.

The judgment appealed from is reversed.

Conrey, P. J., and Works, J., *pro tem.*, concurred.

---

[Civ. No. 2401. First Appellate District.—June 7, 1918.]

HANNAH MOLLOY, Respondent, v. CATHERINE PIERSON, as Administratrix, etc., Appellant.

**JUDGMENT—SETTING ASIDE.**—Equity will not overturn a judgment valid on its face, unless it is against conscience, and it appears that a like judgment would not follow in the same action or upon the same cause of action.

**ID.—MERITORIOUS DEFENSE.**—In an action to set aside a default judgment, the defendant must establish a good defense on the merits to the complaint upon which the judgment is based.

**HUSBAND AND WIFE—DEED TO WIFE—NOTE OF WIFE TO HUSBAND'S CREDITOR—SUFFICIENCY OF CONSIDERATION.**—Where a husband, upon being told that he was about to die, made a deed of all his property to his wife, and the wife at the same time and at her husband's request signed a note to a person to whom the husband was indebted for money loaned, the advantage gained by the wife in not having to probate the estate, and the disadvantage of the creditor in not being able to collect his debt out of the estate, constituted a sufficient consideration for the note.

**PROMISSORY NOTE—DELIVERY—PRESUMPTION FROM POSSESSION.**—A promissory note found in the possession of the payee will be presumed to have been delivered to him upon its date.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. E. P. Shortall, Judge.

The facts are stated in the opinion of the court.

R. W. Gillogley, for Appellant.

James F. Brennan, and John J. West, for Respondent.

**BEASLY, J., *pro tem.***—William Molloy and John J. Ryan were friends. The former had brought Ryan to this country

from their home in the old world, and Ryan had been for years an intimate of Molloy's family. During the years preceding April 1, 1910, Ryan had loaned Molloy several thousand dollars, which on that day was unpaid. These men trusted each other. There had never been any writing between them. On or about April 1, 1910, Molloy being told that he was about to die, sent his wife to the family lawyer for advice about the settlement of his affairs. The lawyer suggested that Molloy deed his property, consisting of certain real estate, to his wife. This advice was followed, and with the aid of a notary, Molloy executed a deed by which all his property was conveyed to his wife. At the same time Mrs. Molloy, at her husband's request, signed a note to Ryan, written by the same notary, for the sum of \$3,287.50, which was the amount of his debt. Three years subsequently Mrs. Molloy gave Ryan eight hundred dollars, which the defendant in this action claims was, and Mrs. Molloy claims was not, a payment on the note. At the same time that she gave Ryan this sum Mrs. Molloy executed a new note to him for \$3,115.44, being the amount due on the first note less eight hundred dollars. Mr. Ryan died in January, 1914, and the defendant in this action was thereupon appointed administratrix of his estate. In June, 1914, the defendant here began an action against Mrs. Molloy to collect the second note given by her to Mr. Ryan. Mrs. Molloy was served with summons in the action by the attorney who began the action. She defaulted by not appearing, and judgment was taken against her on the note. One year later, in July, 1915, an execution was issued and levied on her real estate, whereupon Mrs. Molloy immediately began this action to set aside her default and the judgment against her in the action on the note. In the present action Mrs. Molloy alleges that her default in the other action was procured by fraud practiced upon her by the attorney who began that action on the note, and that she has good defenses to that action on the merits, the defenses she asserts being that the note was without consideration and that it was not delivered.

These defenses deal necessarily with the execution and delivery of the first note given by her to Ryan at the time of her husband's illness.

Equity will not overturn a judgment valid on its face unless it is an unjust judgment. It must be against conscience,

and it must appear that a like judgment would not follow in the same action or upon the same cause of action. (*Harnish v. Bramer*, 71 Cal. 155, [11 Pac. 888].) In order to support an action of this character it is absolutely necessary that the party who attacks the judgment establish a good defense upon the merits to the complaint upon which the judgment is based. (*Reed v. Bank of Ukiah*, 148 Cal. 96, [82 Pac. 845].) The trial court found that the notes were without consideration. Mrs. Molloy testifies that she made the first note to Ryan solely because her husband asked her to do so, and because she wanted to pay, and thought it was a wife's duty to pay, her husband's debts. In face of the presumption that the note was based upon a good consideration, and the evident advantage which Mrs. Molloy gained by the deed in not being compelled to probate her husband's estate, and the disadvantage suffered by Ryan when Molloy conveyed all of his property to his wife, by being placed in a position where he could not collect his debt out of Molloy's estate in probate, and also where, by standing by and consenting to the transfer of the property to the wife, he could not attack that transfer as a fraudulent conveyance, it cannot be said, even upon this testimony of Mrs. Molloy, that this note was without consideration. Mrs. Molloy's testimony is not inconsistent with the fact that this note was based upon a good consideration.

Upon the subject of the delivery of the note there is no evidence that it was actually delivered into the hands of Ryan, nor is there any evidence that it was not so delivered. Thereupon the presumption, from the fact that the note was found in Ryan's possession, that it was delivered to him upon its date controls the finding; and it must be held in this state of the evidence that the note was delivered to Ryan.

These being the only defenses which Mrs. Molloy makes, it must be held that she had no good defense upon the merits to her note, and therefore this action must fail.

The judgment is reversed.

Kerrigan, J., and Zook, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 5, 1918.

[Civ. No. 2397. First Appellate District.—June 8, 1918.]

**ERNEST H. HEITMAN**, as Administrator, etc., Respondent,  
v. **HENRY C. BRUNS et al.**, Appellants.

**DEED—DELIVERY TO NOTARY PUBLIC—RESERVATION OF CONTROL—TITLE NOT DIVESTED.**—Where a grantor delivered a deed to a notary public with instructions to keep the deed until the grantor called for it, or until the death of the grantor, and in the latter event to hand it to the father of the grantees, there was no delivery sufficient to pass title.

**EVIDENCE—REJECTION OF TESTIMONY—RIGHT OF COURT.**—While it is true that a judge or jury have no right to arbitrarily reject testimony, this may be done when it does not produce conviction.

**ID.—NUMBER OF WITNESSES—INSTRUCTION—RULE APPLICABLE TO JUDGE AND JURY.**—The rule laid down in subdivision 2 of section 2061 of the Code of Civil Procedure that jurors are to be instructed that they are not to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds, as against a presumption of other evidence satisfying their minds, applies alike to judge and jury.

**ID.—CONTRADICTION OF WITNESS BY FACTS.**—A witness may be contradicted by the facts he states as completely as by direct adverse testimony.

**ACTION TO SET ASIDE DEED—LACK OF DELIVERY—WANT OF CONSIDERATION—FINDINGS SUPPORTED BY EVIDENCE.**—In this action by an administrator to set aside a deed made by his deceased wife, it is held the findings of nondelivery of the deed, lack of consideration, and that the wife was the owner of the property at the time of her death, were supported by the evidence.

**APPEAL** from a judgment of the Superior Court of Contra Costa County. R. H. Latimer, Judge.

The facts are stated in the opinion of the court.

Mastick & Partridge, and Alan C. Van Fleet, for Appellants.

J. E. Rodgers, and M. R. Jones, for Respondent.

**KERRIGAN, J.**—This action was brought by plaintiff, as administrator of the estate of his deceased wife, to set aside a deed made by her in her lifetime to defendants.

The complaint is in two counts. It is alleged in the first that the deed was procured by the undue influence of defendants, that there was no consideration therefor, and that it lacked delivery. The second count alleged that the grantor at the time of the execution of the deed was of unsound mind, and that there was no consideration and no delivery. The answer denied these allegations, and set forth a cross-complaint praying that defendants' title to the land be quieted against plaintiff.

The case was tried with an advisory jury. Special issues were submitted upon the questions of undue influence, unsoundness of mind, and delivery. The jury found against the defendants on all of these issues. The trial court, however, adopted only the finding that the deed in question had never been delivered. It further found that no consideration was paid by defendants, or any of them, for the property, and that its value was in excess of the sum of twenty thousand dollars, and that the deed made by the grantor was null and void. Judgment was thereupon entered canceling said deed and quieting the title of plaintiff and the estate of decedent to the property. The appeal is from such judgment.

The question here presented is whether or not the evidence sustains the findings of the trial court.

Appellants claim on the question of delivery that the evidence is clear, uncontradicted, and unequivocal, and that, therefore, this question has resolved itself into one of law; and accordingly they contend that the conclusions of law and the judgment thereon are "against law." A discussion of the evidence, therefore, becomes necessary.

From the facts surrounding the execution of the deed in question it appears that in the latter part of November, 1912, Martha L. Heitman was living on her farm, near Byron, in Contra Costa County, the property which is the subject matter of this litigation. She was a woman advanced in life, being over eighty years of age. She had, in 1907, married a man much younger than herself, with whom she lived intermittently and who was her third husband. In November, 1912, she left her farm and went to the home of Henry Bruns, one of the defendants herein, and she thereafter lived with the Bruns family until her death, which occurred on December 30, 1913, some thirteen months after her advent into this household. During her stay Mrs. Bruns, aided by her daugh-

ters, two of the defendants herein, performed some service for Mrs. Heitman, contributing to her comfort. The Bruns family were neighbors and in no manner related to Mrs. Heitman. Within a week after her arrival, according to the testimony of Mrs. Bruns, Mrs. Heitman expressed a desire to convey her property to the defendants herein. Thereupon, Henry Bruns, the father, and William Bruns, his son, went to Brentwood, a town close by, to get Robert Wallace, a justice of the peace and notary, to make a deed of Mrs. Heitman's property. Mr. Wallace did not come as soon as he was sent for, and thereafter, on December 4, 1912, William Bruns, one of the grantees named in the deed, again went after and brought him and one Shafer to the Bruns home. On that day Mr. Wallace drew two deeds, one conveying from Mrs. Heitman to the Bruns children, all of whom were adults, her real property in Contra Costa County, valued at more than twenty thousand dollars, which is the deed in controversy; and the other purporting to convey to the same persons her real property in Alameda County, consisting of 160 acres. After these deeds were executed Mrs. Heitman told Mr. Wallace to keep them until she called for them or until she died, and in that event to hand them to Bruns, Sr. Wallace at this time stated to Mrs. Heitman that whenever she wanted the deeds back she could get them. Wallace then took these deeds away with him and continued to hold them until after the death of Mrs. Heitman, when, according to her instructions, he gave them to Bruns, who thereupon requested Wallace to record them, which he did.

It is conceded, as indeed it must be, that up to the time Wallace took the deeds away there was no delivery of them, for the grantor did not then relinquish all control over them, but, on the contrary, she specifically reserved the right to recall them at any time. Appellants, however, seek to show a delivery some two or three months thereafter, based on the testimony of Henry Bruns, Sr., and his son, William, to the effect that Mrs. Heitman requested that the deeds be recorded. It is in evidence that Bruns, Sr., attempted about this time to have Wallace record them, but this he refused to do as being contrary to his instructions. No further attempt was made during Mrs. Heitman's lifetime to have the deeds recorded. This testimony of Bruns and his son was uncontradicted; and it is by reason of this fact that the claim is made that under

these circumstances the question of delivery is one of law and not of fact.

While it is true that a judge or jury have no right to arbitrarily reject testimony, this may be done when it does not produce conviction. By section 2061, subdivision 2, of the Code of Civil Procedure, jurors are to be instructed that they are not to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds, as against a presumption or other evidence satisfying their minds. This rule applies alike to judge and jury.

It has been said that no weaker kind of testimony can be produced than the testimony of a person or persons as to a conversation between themselves and a deceased person. (*Mattingly v. Pennie*, 105 Cal. 514, [45 Am. St. Rep. 87, 39 Pac. 200]; *Byrne v. Byrne*, 113 Cal. 294, [45 Pac. 536].)

Here, too, the alleged oral direction of Mrs. Heitman to have the deeds recorded rests solely upon the evidence of Bruns and his son, who are interested parties.

A witness may be contradicted by the facts he states as completely as by direct adverse testimony. (*Bellus v. Peters*, 165 Cal. 112, [130 Pac. 1186]; *Prewett v. Dyer*, 107 Cal. 154, [40 Pac. 105]; *Clark v. Tulare Dredging Co.*, 14 Cal. App. 432, [112 Pac. 564]; *Phillips v. Huffaker*, 35 Cal. App. 531, [170 Pac. 431].)

The circumstances connected with the transaction were certainly such as justified the court in rejecting and disregarding the testimony of Bruns and his son. After the alleged instructions Mrs. Heitman lived some nine months, and no attempt was made by her thereafter to have these instructions carried out. In addition thereto there is no evidence that any of the grantees named in the deed ever exercised any right whatever over this land, or ever claimed to own it, or had it assessed to them, or did anything whatever which would indicate any claim of title in them. On the contrary, the testimony shows that there was no intention on the part of Mrs. Heitman to vest title in the grantees until after her death. A reading of the testimony of Bruns, Sr., and especially that portion relating to the claim that he attempted to collect rents from the property, does not carry conviction.

The claim that the transfer was made in consideration of an oral agreement by the grantees to support the grantor during her life in no manner strengthens the case of appellants. It

is in evidence that shortly after the execution of the deeds Mrs. Heitman transferred to these same grantees all of her stock, farming implements, and other personal property in consideration for this very support.

From all the circumstances and from a consideration of the entire evidence in the case it is difficult to imagine how the jury or the court could have reached a different conclusion than they did. Within two weeks after the arrival of this aged and infirm woman in their midst—a woman found by the advisory verdict of the jury to be of unsound mind, upon evidence that would have supported a finding based thereon—the Bruns family dispossessed her of all her real and personal property amounting to a very substantial sum, and they seek to retain the same upon an alleged oral contract to provide and care for her, where the evidence shows that no such contract was ever entered into.

The findings of the trial court that the deed in question had never been delivered; that there was no consideration for the same, and that it was null and void; that Mrs. Heitman was the owner and in the possession of the lands in question at the time of her death, were all questions of fact, and the findings thereon find full and complete support in the evidence.

Judgment affirmed.

Beasley, J., *pro tem.*, and Zook, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 5, 1918.

---

[Civ. No. 2335. First Appellate District.—June 11, 1918.]

J. & H. GOODWIN, LIMITED (a Corporation), Respondent,  
v. JOHN FRANICH et al., Copartners, etc., Appellants.

CONTRACT—LETTERS—PAROL EVIDENCE—PRELIMINARY NEGOTIATIONS—  
CIRCUMSTANCES AND SITUATION OF PARTIES.—In an action to recover  
a balance due on an alleged contract, evidenced by letters, parol  
testimony as to oral negotiations prior to the writings is admissible



for the purpose of showing the circumstances and situation of the parties.

**ID.—FAILURE TO OBJECT TO TESTIMONY—APPEAL.**—In such an action, where no objection was raised to the admission of such testimony, the defendants cannot be heard to complain on appeal.

**APPEAL** from a judgment of the Superior Court of Santa Cruz County. Benjamin K. Knight, Judge.

The facts are stated in the opinion of the court.

Geo. W. Smith, for Appellants.

Wyckoff & Gardner, for Respondent.

**THE COURT.**—In this action plaintiff sought and recovered judgment in the sum of \$959.85, claimed and found by the lower court to be due plaintiff for a balance of four thousand dollars loaned to defendants on the seventeenth day of October, 1912, pursuant to the terms of a contract previously entered into by said plaintiff and defendants.

The contract and the negotiations between the plaintiff and the defendants were evidenced by letters. The court permitted, over plaintiff's objection, testimony as to oral negotiations relative to the transaction prior to the date of the letters which contained the terms of the contract, limiting its admission, however, to the purpose of enabling the court to determine whether or not the contract was contained in the letters. The defendants made no objection to the court's ruling at that time, but urge for the first time upon appeal that the testimony should have been admitted generally. Inasmuch as the evidence showed that the letters dated October 12 and October 16, 1912, constituted the contract between the parties, it was not error, we think, to admit the testimony as to oral negotiations prior to the written contract for the limited purpose of showing the circumstances and situation of the parties. (Code Civ. Proc., secs. 1856, 1860.) But however this may be, since the defendants raised no objection to the limited purpose for which the testimony in question was admitted, they cannot now be heard to complain. (*Morgan v. Hugg*, 5 Cal. 409; *Mott v. Smith*, 16 Cal. 534.)

The only other point attempted to be made by appellant is that plaintiff's case has not been made out by a preponderance

of the evidence. Were this true, it would not be a sufficient reason for disturbance of the judgment. If the judgment is supported by any substantial evidence—and in the instant case there is abundant evidence—the judgment must be upheld.

Judgment affirmed.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 8, 1918.

---

[Civ. No. 2016. First Appellate District.—June 11, 1918.]

**JOHN W. MCCARTHY**, Appellant, v. **BOARD OF FIRE COMMISSIONERS OF THE CITY AND COUNTY OF SAN FRANCISCO** et al., Respondents.

**STATUTORY CONSTRUCTION — DIFFERENT LANGUAGE — PRESUMPTION. —**

When different language is used in the same connection in different parts of a statute, it is presumed the legislature intended a different meaning and effect.

**ID.—REPEATED USE OF PHRASE—PRESUMPTION.—**A word or phrase repeatedly used in a statute will be presumed to bear the same meaning throughout the statute, unless there is something to show that another meaning is intended.

**MUNICIPAL CORPORATIONS — SAN FRANCISCO BOARD OF FIRE COMMISSIONERS AND SECRETARY—CIVIL SERVICE.—**Under the charter of the city and county of San Francisco, the words "fire department" as employed in the civil service section of the charter are not intended to embrace the board of fire commissioners nor the secretary thereof, and therefore such secretary does not come under the protection of section 12 of article XIII providing that no person employed in the classified civil service shall be removed or discharged, except for cause, upon written charges and after an opportunity to be heard in his own defense.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. **Geo. A. Sturtevant**, Judge.

The facts are stated in the opinion of the court.

Paul A. McCarthy, for Appellant.

George Lull, City Attorney, and Maurice T. Dooling, Jr., Assistant City Attorney, for Respondents.

BEASLY, J., *pro tem.*—The plaintiff, John W. McCarthy, petitioned the superior court for a writ of mandate to compel the board of fire commissioners of the city and county of San Francisco to reinstate him as their secretary. On February 3, 1910, he was such secretary, and on that day the board passed a resolution removing him. The superior court denied the writ, and he appeals.

In supporting his claim for a reversal of the judgment McCarthy contends that the secretary of the board of fire commissioners is within the classified civil service provisions of the charter of the city and county of San Francisco, and consequently comes under the protection of section 12 of article XIII thereof (Stats. 1899, p. 241), providing that no person employed in the classified civil service shall be removed or discharged except for cause upon written charges and after an opportunity to be heard in his own defense.

The board in appointing McCarthy went through the form of complying with the civil service rules, and undoubtedly at the time of his appointment considered their secretary to be within the classified list. No charges were made against him when he was dismissed and he had no trial.

The respondents argue that the office of secretary in question is not within the classified list, and that even if it were, McCarthy was not eligible to the position when appointed, as he was then over thirty-five years of age, which is the limit age prescribed by section 6, chapter 1, article IX, of the charter, as it stood at the time of McCarthy's appointment, for all persons appointed to positions in the department. We are inclined to think both these positions of respondents to be well taken.

Without enumerating all the city functionaries to whom the civil service provisions of the charter apply, it may be said that at the time McCarthy was discharged, and until March 28, 1913, section 11 of article XIII provided that the civil service provisions should apply to the fire department and numerous other positions and officials. What officers should be included within the meaning of the term "fire depart-

ment" was not specified in that section, and we are left to a critical examination of the language of the charter to ascertain what is meant thereby, and specifically whether the secretary of the board of fire commissioners is to be considered as included within the term, and so whether the secretary was a member of the fire department within the meaning of the civil service provisions of the charter.

Perhaps this question can be best understood by a comparison between the provisions of the charter in relation to the police department and the fire department. While the police department is specified to consist of a board of police commissioners, a chief of police, a police force, and such other clerks and employees as shall be necessary to carry into effect the provisions of the article providing for the policing of the city (Charter, sec. 1, ch. 1, art. VIII), the fire department is not specified to *consist* of all corresponding persons engaged in the protection of the city from fire, but rather to be *under the management of the board of fire commissioners* (sec. 1, ch. 1, art. IX).

When different language is used in the same connection in different parts of a statute it is presumed the legislature intended a different meaning and effect. (Black on Interpretation of Laws, 2d ed., p. 145.) As it is clear that under the language above quoted in relation to the police department the secretary of the department would be a member of the police department, so if we apply this cardinal rule of statutory construction to the different language employed by the charter framers in dealing with the two departments, it must be held that while the commissioners, for instance, of the police department are members of that department, the board of fire commissioners are not members of the fire department. The legislature must be presumed to know the meaning of language; and when one set of words is used in one section and another in another section, the presumption is that the legislature intended to convey a different meaning if the two sets of words ordinarily have different meanings. (*Lehman, Durr & Co. v. Robinson*, 59 Ala. 219.) And it has similarly been held that a change of legislative purpose is to be presumed from a material change in the wording of a statute. (*Hasely v. Ensley*, 40 Ind. App. 598, [82 N. E. 809]; *Rich v. Keyser*, 54 Pa. St. 86, 89; *Thomas v. Joplin*, 14 Cal. App. 662, [112 Pac. 729].) This rule is applicable likewise to material

changes between the language used in different sections of the same statute.

It would seem plain from this that the words "fire department," as employed in the civil service section of the charter, are not intended to embrace the board of fire commissioners nor the secretary thereof.

Again, the officers and members of the fire department are enumerated in section 1, chapter 8, article IX, of the charter for the purpose of fixing salaries; and the secretary is not enumerated among them.

It is further provided by section 2 of chapter 3 of article IX that the chief engineer may suspend any subordinate officer, member, or employee of the department. It is plain that this does not refer to the secretary. And in section 2 of chapter 8 of the same article is a provision for vacations of officers and members of the fire department, in which it is provided that during each year of his service a vacation of not less than fifteen days duration, and also leaves of absence of not less than twenty-four hours duration not less times than once in each week, shall be due each officer and member of the fire department without loss of pay. Certainly it will not be contended that the words "officers and members of the fire department," as used in the last section referred to, were intended to include the secretary.

It is a familiar principle of the construction of statutes that a word or phrase repeatedly used in the statute will be presumed to bear the same meaning throughout the statute unless there is something to show that another meaning is intended. (*McClain v. Hutton*, 131 Cal. 143, [61 Pac. 273, 63 Pac. 182, 622]; *Robbins v. Omnibus Railroad*, 32 Cal. 472, 474; *Ransome-Crummey Co. v. Woodhams*, 29 Cal. App. 356, 361, [156 Pac. 62].) There is nothing here to show that a different meaning was intended by the use of the words "the fire department" or "officers and members of the fire department" in the section referring to salaries and vacations, than the meaning intended to be affixed to this language in section 11 of article XIII providing for the civil service.

The proposition that the secretary is not a member of the fire department is further supported by the decision of the supreme court in the case of *Maxwell v. Fire Commissioners*, 139 Cal. 229, [72 Pac. 996], in which the former clerk of the board sought to be retained as secretary of the new board of

fire commissioners as organized under the present charter. The court there said: "The position of clerk as prescribed in the law of 1878 is not in terms at least contained in the new charter. By the old law, as shown, the clerk was required to be one of the members and employees of said fire department. No such qualification is required by the new charter in regard to the secretary. It simply declares that the board may appoint a secretary who shall perform such duties as the board may prescribe. It cannot be said, therefore, that the secretary of the board under the new charter is the same office or place as the clerk mentioned under the old law. Chapter 8 of article IX of the charter provides that 'the officers and members of the fire department shall receive annual salaries as follows,' and then enumerates the different classes of officers and members but does not mention the secretary of the board, nor any 'clerk' of the fire department. It is a fair inference that the direction in chapter 2 that in reorganizing the force the department shall make its appointments of 'officers and members' from the force in service when the charter took effect, applies only to the 'officers and members' whose salaries are fixed in chapter 8, and, as the secretary is not one of those enumerated, it would follow that the board is not required to select him from the members of the old fire department. From the foregoing, and from the nature of the office and the necessity for the greatest degree of confidence between the incumbent and the board, it would seem that it was the intention of the framers of the charter that the appointment of the secretary should be left to the discretion of the board."

Aside from this, as stated by counsel for the respondents in their brief, if the foregoing construction of the charter provision is incorrect, and if it should be conceded that McCarthy was, as secretary, an officer and member of the fire department, and, therefore, within the civil service provisions of the charter, he still must fail to establish his position here, because of the fact, found by the trial court, that at the time of his appointment to the position of secretary of the board of fire commissioners he was above the age of thirty-five years, and therefore not eligible to a position in the department. Section 6, chapter 1, article IX, provides that all persons appointed to positions in the fire department must be not less than twenty-one nor more than thirty-five years of age. That provision of the charter is plain and unambiguous. It formed

a part of the present charter of the city and county of San Francisco when that instrument was first adopted, was in full force at the time of McCarthy's election to the position of secretary to the board and at the time he was discharged therefrom, and remained in that form until it was changed by an amendment adopted by the people on November 15, 1910, approved by the legislature on the 17th of February, 1911. (Stats. 1911, p. 1661.)

So that, taking either view of the plaintiff's case, whether McCarthy be considered as a member of the fire department, and so subject to the civil service sections of the charter, or whether he be considered as not within the meaning of those sections, he was still in a position where the board of fire commissioners had a right to discharge him, and he cannot be reinstated by the courts.

The judgment is affirmed.

Kerrigan, J., and Zook, J., *pro tem.*, concurred.

---

[Civ. No. 2697. Second Appellate District.—June 12, 1918.]

**FRANK I. KAUFFMAN, Petitioner, v. INDUSTRIAL  
ACCIDENT COMMISSION et al., Respondents.**

**WORKMEN'S COMPENSATION ACT — PROCEEDINGS FOR COMPENSATION FOR  
"FURTHER DISABILITY"—TIME LIMITATION.**—Under section 16, sub-  
division c, of the Workmen's Compensation, Insurance and Safety  
Act, relating to the right to institute proceedings for the collection  
of compensation for "further disability," the additional disability  
may reasonably be defined as referring to any disability in addi-  
tion to that for which proceedings were commenced within six months  
from the date of the injury, or that for which disability indemnity  
has been paid or agreed to be paid, and if there have been no  
proceedings commenced within six months from the date of the  
injury, and if there has been no payment of disability indemnity or  
agreement therefor, the employee is not entitled to institute pro-  
ceedings grounded upon "further disability" after the expiration  
of six months from the date of the injury.

**APPLICATION** for an order setting aside an order of the  
District Court of Appeal for the Second Appellate District

denying an application for a Writ of Review to annul an order of the Industrial Accident Commission.

The facts are stated in the opinion of the court.

Alfred Siemon, for Petitioner.

R. P. Wisecarver, for Respondents Federal Drilling Company et al.

**THE COURT.**—Petitioner has applied to this court for an order setting aside the order by which the court denied his application for a writ of review.

On December 6, 1917, petitioner filed with the Industrial Accident Commission an application for adjustment of his claim against Federal Drilling Company, a corporation, and London & Lancashire Indemnity Company of America (a corporation), by which he sought to obtain compensation for disability resulting from an injury received by petitioner on the tenth day of March, 1916, while in the employ of Federal Drilling Company. No application had been filed by petitioner within six months from the date of the injury; but he claimed, and now claims, that at the time of filing his application he was still entitled to make an original application for "further disability" caused by and suffered from the original injury, upon the ground that such original injury had in fact caused further disability within the meaning of the provisions of the statute to which we shall refer.

Section 16 of the Workmen's Compensation, Insurance and Safety Act, approved May 26, 1913, (Stats. 1913, p. 287), as amended in 1915, (Stats 1915, p. 1085), so far as applicable to this proceeding, reads as follows:

"(a) Unless compensation is paid or an agreement for its payment made within the time limited in this section for the institution of proceedings for its collection, the right to institute such proceedings shall be wholly barred.

"(b) The periods within which proceedings for the collection of compensation may be commenced are as follows:

"(1) Proceedings for the collection of the benefit provided by subsection (a) of section fifteen or for the collection of the disability indemnity provided by subsection (b) of said section fifteen must be commenced within six months from the



date of the injury, except as otherwise provided in this act. . . . (c) The payment of the disability indemnity . . . or any part thereof, or agreement therefor, shall have the effect of extending the period within which proceedings for its collection may be commenced, six months from the date of the agreement or last payment of such disability indemnity . . . or any part thereof; *provided, however*, that nothing contained in this section shall be construed to bar the right of any injured employee to institute proceedings for the collection of compensation within two hundred and forty-five weeks after the date of the injury, upon the grounds that the original injury has caused further disability; and the jurisdiction of the commission, in such cases, shall be a continuing jurisdiction at all times within such period."

By the findings of fact of the Industrial Accident Commission, set forth in its order as amended by the commission upon rehearing, it appears that the applicant sustained his injury on March 10, 1916, the injury consisting in his left eyeball being penetrated by a minute piece of steel. At that time, and for some time thereafter, the injury appeared to be very slight, and it was not known until the following September that there was any foreign substance in said eye. The piece of steel was removed in September, 1916. The disability increased gradually from that time until about the time of the filing of the application for adjustment of claim on December 6, 1917. Within the six months immediately preceding the filing of the application there was no substantial change in the applicant's condition, nor in the character of his disability, except that the vision continued to decrease slowly and gradually as before. Upon the facts the commission held that the claim was barred by the period of limitations contained in the statute as above set forth.

The question here presented depends upon the meaning of the words "further disability" in the proviso contained in subdivision (c) of section 16. What is the additional disability intended by the use of the words "further disability"? The answer must be found in the preceding portions of section 16. We there find that within six months from the date of the injury the employee may commence proceedings before the commission for the collection of a disability indemnity. Or there may be payment of the disability indemnity, or some part thereof, or agreement therefor; and if there be such pay-

ment or agreement, the period within which proceedings for its collection may be commenced is extended for a period of six months from the date of the agreement or last payment of such disability indemnity, or any part thereof. Taking into consideration these provisions of the statute, together with the proviso concerning the right to institute proceedings for the collection of compensation for "further disability," it seems clear that this additional disability may reasonably be defined as referring to any disability in addition to that for which proceedings were commenced within six months from the date of the injury, or that for which disability indemnity has been paid or agreed to be paid. If there have been no proceedings commenced within six months from the date of the injury, and if there has been no payment of disability indemnity or agreement therefor, the employee is not entitled to institute proceedings grounded upon "further disability" after the expiration of six months from the date of the injury.

Following our usual custom in cases where the application for an original writ is denied, we made our former order without filing any written opinion. In this case, however, the applicant in his petition for rehearing has urgently requested a written statement of the grounds of decision; and this opinion is our answer to that request.

The application for a rehearing is denied.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on July 15, 1918.

---

[Civ. No. 2400. First Appellate District.—June 12, 1918.]

ERNEST N. SMITH, Appellant, v. W. G. MACDONALD,  
Respondent.

CONTRACT — ACKNOWLEDGMENT AND PROMISE TO PAY INDEBTEDNESS —  
COVENANT NOT TO SUE—MORAL OBLIGATION.—A written acknowledgment and agreement to pay an indebtedness providing that it is part and parcel of the acknowledgment that it shall be void should legal steps of any kind be taken to force payment, or should the indebted-

edness be transferred without the permission of the debtor, is a valid and enforceable covenant not to sue, and the promise to pay constitutes merely a moral obligation.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. E. P. Shortall, Judge.

The facts are stated in the opinion of the court.

Denson, Cooley & Denson, for Appellant.

Louis Ferrari, for Respondent.

KERRIGAN, J.—This is an appeal from a judgment sustaining a demurrer to the complaint, without leave to amend. The action was based upon a written instrument which the trial court held to constitute only a moral obligation. The instrument reads as follows:

“May first, 1912.

“I, W. G. Macdonald, hereby acknowledge my indebtedness to Ernest N. Smith in the sum of five thousand dollars (\$5,000).

“I agree to pay Ernest N. Smith interest at the rate 7% per annum on this amount (\$5,000) with the understanding that the indebtedness may be retired in installments; in the event that installments are paid interest is to be computed only on balance due.

“In view of the fact that W. G. Macdonald and Ernest N. Smith were equal partners in the Macdonald Sales Company up to the signing of this acknowledgment and attached agreement, and that W. G. Macdonald voluntarily agreed to release Ernest N. Smith from his partnership with attending possibilities of considerable financial loss, and agrees to pay Ernest N. Smith ultimately a sum considerably greater than his actual partnership interest, it is part and parcel of this acknowledgment of indebtedness that it shall be void should legal steps of any kind be taken to force payment, or should the indebtedness be transferred without the permission of W. G. Macdonald.

“(Signed) W. G. MACDONALD.

“Accepted:

“(Signed) ERNEST N. SMITH.”

We think the clause in this unusual document, that if suit should be brought to enforce collection the obligation shall be void, is a valid and enforceable covenant not to sue, and that the promise to pay the sum agreed constituted merely a moral obligation.

The parties to this agreement were of age and of competent understanding; and as the contract appears to have been freely and voluntarily entered into, and is one that is not against public policy in any respect, it should be upheld. It would be a grave injustice to defendant to hold that an action would lie to enforce the payment of the amount mentioned in this instrument, when it appears that a part of the consideration for the promise to pay was the stipulation on the part of the payee that the obligation should be void if suit should be brought thereon. The right to enforce any obligation which the plaintiff may have had against the defendant was his, and he could do with it as he saw fit—could agree to relinquish it or insist on preserving it. Whichever course plaintiff deemed proper to adopt was no matter of public concern, and affects no question of public policy. (*Gitler v. Russian Co.*, 124 App. Div. 273, [108 N. Y. Supp. 793]; 9 Cyc. 335; *Richardson v. Thomas*, 28 Ark. 387.)

In the case of *Barnard v. Cushing*, 4 Met. (Mass.) 230, [38 Am. Dec. 362], the payee of a note, at the time it was signed by the maker, indorsed thereon a promise not to compel payment thereof, but to receive payment when convenient for the maker to pay. At page 235 of the opinion the court used the following language: "The result is that no action can be maintained upon this promise. Taking it with all its stipulations, it is only an honorary engagement—a memorandum by which the promisees may remind the promisors of the honorary obligation outstanding against them."

In *Greenhood on Public Policy and the Law of Contracts*, page 469, it is said: "An agreement by which a creditor deprives himself of the power to enforce a debt, but confides the question of payment to the discretion of the debtor, is not void."

In *Nelson v. Van Bonnhorst*, 29 Pa. St. 352, the court, in passing upon a similar case, said: "If it is reasonable for a man to release a debt altogether, surely it is reasonable to release the remedies of a debt, not itself released, which is done in covenants not to sue; and even if it be not reasonable, we

cannot set up our reasons or the public reasons for that of the contracting parties, and make a contract for them that is contrary to their plain intention, without violating the first principles of freedom and the very nature of contract relations. We cannot read this contract as a legal obligation, as the remedy to enforce the obligation is by mutual consent withheld; thus the obligation is merely a moral one."

The judgment is affirmed.

Beasley, J., *pro tem.*, and Zook, J., *pro tem.*, concurred.

---

[Civ. No. 2706. Second Appellate District.—June 12, 1918.]

ALLETHA P. HAMMOND, Respondent, v. JUSTICE'S COURT OF LOS ANGELES TOWNSHIP et al., Appellants.

**COSTS—ACTIONS IN JUSTICES' COURTS—RIGHT TO SUE IN FORMA PAUPERIS.**—The township justices' courts of this state are, as were courts at common law, vested with power to, and should upon a proper showing, admit parties to sue *in forma pauperis*, since the statutory provisions with reference to prepayment of costs are not applicable to the exceptional cases of indigent suitors who at common law were entitled to sue without payment of such costs.

APPEAL from a judgment of the Superior Court of Los Angeles County. Grant Jackson, Judge.

The facts are stated in the opinion of the court.

A. J. Hill, County Counsel, David R. Faries, and E. T. Bishop, Deputies County Counsel, for Appellants.

Walton J. Wood, Public Defender, for Respondent.

SHAW, J.—The sole question involved herein is petitioner's right, upon a conceded showing, made in the justice's court of Los Angeles township, that she was destitute and unable to pay the cost, to prosecute *in forma pauperis* an action brought by her in said court. The trial court held that she was so entitled to sue and made its order granting a peremptory writ of mandate, directed to the justices' court, re-

quiring it to proceed with the trial without the payment of such cost. The appeal is from this order.

In our opinion, the decision in *Martin v. Superior Court*, 176 Cal. 289, [L. R. A. 1918B, 313, 168 Pac. 135], must be regarded as conclusive in support of the order made by the trial court. In that case the right to prosecute the action *in forma pauperis* was upheld upon the ground that such right existed at common law, which, in the absence of any statutory modification thereof, must be deemed the rule of decision in the courts of this state. The only distinction between that case and this is that in the former the action was pending in the superior court, while in the instant case it is pending in the court of a township justice. The essential facts are identically the same, since in each case an indigent plaintiff, unable to pay the cost, and upon a sufficient showing thereof, sought a civil remedy in a court having jurisdiction of the subject matter of the action. Upon the authority of what is said in the opinion in the *Martin* case, we are constrained to hold that the township justices' courts of this state are, as were courts at common law, vested with power to, and should upon a proper showing, admit parties to sue *in forma pauperis*, unless such power is restricted by statute. As to this, the statutory provisions with reference to prepayment of costs in justices' courts are, in substance, the same as those applicable to payment of costs in the superior courts, and as to which it was said in the opinion to which we have referred that such statutes, being general in their nature, are not applicable to cases where the court has, in the exercise of its power, remitted the payment of the fees on behalf of a poor suitor; that "in every instance the court's order to this effect is sufficient warrant to every officer charged with the collection of fees to omit the performance of that duty in the specified case." In other words, the statutory provisions as to costs were not intended to, and do not, apply to the exceptional cases of indigent suitors who at common law were entitled to sue without payment of such costs.

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 9, 1918.

[Civ. No. 1834. Third Appellate District.—June 18, 1918.]

MARY ISABELLE BUICK et al., Respondents, v.  
BENJAMIN F. BOYD, Appellant.

**ACTION TO REFORM CONTRACT—SETTLEMENT OF PROPERTY RIGHTS OF  
MARRIED PERSONS—DECREE IN DIVORCE ACTION NOT RES JUDICATA.—**

Where in an action for divorce the husband and wife adjust their property rights without the intervention of the court pending the action, the decree determining that the property be awarded to the respective parties in accordance with their agreement is not *res adjudicata* so as to bar an action by the wife to reform the description of certain real property contained in the agreement.

**APPEAL** from a judgment of the Superior Court of Shasta County. James G. Estep, Judge.

The facts are stated in the opinion of the court.

Braynard & Kimball, for Appellant.

Orr M. Chenowith, for Respondents.

CHIPMAN, P. J.—Defendant Benjamin F. Boyd appeals from a judgment reforming the description of real property in a written contract.

Plaintiff Mary Isabelle Buick was formerly Mary Isabelle Boyd, wife of defendant Benjamin F. Boyd, and the mother of plaintiffs Alfreida Elinor and Malcolm Glenn Boyd, infant children of the marriage. Defendants Eugene Boyd and Edna Boyd are also children of the said marriage and are made defendants because their consent to be joined as plaintiffs could not be obtained and because united in interest with plaintiffs. Plaintiff John H. Buick is joined with plaintiff Mary Isabelle Buick, being her husband at the commencement of the action.

On February 11, 1909, plaintiff Mary Isabelle Buick, then Mary Isabelle Boyd, commenced an action for a divorce in the superior court of Shasta County on the ground of extreme cruelty. Pending the action, on March 4, 1909, she and her then husband entered into a written agreement settling their property rights, her claims for alimony, counsel fees and

costs. Final decree in the action was granted the plaintiff May 3, 1910.

The concluding paragraph of the interlocutory decree reads as follows: "And it further appearing that the rights of the respective parties in and to the property described in said complaint have been equitably adjusted by an agreement between the parties, it is determined that the said property be awarded to the respective parties in accordance with said agreement, dated the fourth day of March, A. D. 1909."

This agreement was intended to make disposition of all the property which either of the parties claimed to own, some belonging to each being separate property and some the property of the community. It not only purports to adjust all claims to property, but it adjusts all matters of alimony, counsel fees, and the support and maintenance of the minor children. Reciting the pendency of the action, it declares that "the parties hereto are desirous of settling said dispute of claims to the property in controversy and withdrawing the same from the consideration of the court, and whereas, the parties hereto are desirous of making provision for the support of the said minor children and for the son and daughter of the party of the first part herein (Benjamin F. Boyd), Eugene Boyd and Edna Boyd, Now, therefore, it is hereby mutually covenanted," etc. The contract then awards to the second party (Mrs. Boyd) the ownership and possession of the homestead (describing the lot) theretofore declared. "Also a certain tract of land adjoining said lot, piece or parcel of land being the  $W\frac{1}{2}$  of the  $NW\frac{1}{4}$  of the  $NE\frac{1}{4}$  and the  $NE\frac{1}{4}$  of the  $NW\frac{1}{4}$  of the  $NW\frac{1}{4}$  of Section 11, Township 30 North, Range 7 West; also the water ditch and water right belonging to said premises" (describing the ditch). The alleged mistake was in the call " $NE\frac{1}{4}$  of  $NW\frac{1}{4}$  of  $NW\frac{1}{4}$ , Section 11," which should have read " $NE\frac{1}{4}$  of  $NW\frac{1}{4}$ , Section 11." It is further provided that second party "may continue to own, hold, occupy, possess and use [a certain lot in the town of Redding, describing it, and declared by the agreement to be her separate property], to have and hold the same, together with the rents, . . . during her lifetime or so long as she shall remain single and unmarried, for the better maintenance, support, care and education of herself and the two said minor children," and to go to said four children, Eugene, Edna, Alfreida, and Malcolm, should she



remarry. Then follows a clause by which the first party "does hereby grant all of his right, title and interest in and to said land and premises unto the said party of the second part to her use and to the use of said four children, . . . upon the conditions mentioned herein." Certain livestock, the separate property of second party, "shall continue to be and remain the property of the party of the second part herein as her separate and individual estate; and in consideration of the waiver of her right to alimony, the said party of the first part hereby agrees to pay to the said party of the second part the sum of \$53.50 for costs and attorney's fees herein." It is then provided that certain real property (describing it) "shall continue to be and remain" the separate property of first party. Follows also a provision that in consideration of the grant to her as provided in the agreement, the second party "waives any claim for maintenance and support against the party of the first part, and hereby waives any right or title in and to any of the property of the party of the first part, except as expressed in this agreement." The instrument was duly acknowledged by the parties on the day of its date before Francis Carr, a justice of the peace in and for Redding Township, Shasta County.

By appropriate averments in his answer, appellant claims "that plaintiffs are and each of them is precluded or estopped from suing upon the alleged cause of action set forth in said amended complaint herein for the following reasons"; that the said court, on May 3, 1910, "made and rendered its final decree of divorce" dissolving the marriage which had theretofore existed between said Mary Isabelle and Benjamin F. Boyd, and "that no motion for a new trial was made or appeal taken from said final decree and said decree is now in full force and effect"; that said written agreement "was and now is merged in the said final judgment of divorce and the said plaintiffs in the above entitled action are and each of them is precluded or estopped from suing upon the alleged cause of action set forth in the said amended complaint."

Appellant's contention is stated as follows: "The title to the property involved having been adjudicated in the divorce action, the final decree of divorce is *res adjudicata* and is a bar to the present action."

The court found as facts, among others: "That the said plaintiff and the said defendant intended to set forth and de-

scribe in said agreement the west half of the northwest quarter of the northeast quarter, and the northeast quarter of the northwest quarter of section 11, township 30 north, range 7 west, M. D. M., in the county of Shasta, state of California, but by mutual mistake in drawing and writing said agreement, said property intended to be described was incorrectly and by mistake described by the persons employed to draft and write said agreement, as the west half of the northwest quarter of the northeast quarter, and the northeast quarter of the northwest quarter of the northwest quarter, of section 11, township 30 north, range 7 west, M. D. M.; that said mistake in description was and is a clerical mistake made in writing and drafting said agreement. . . . That said mistake was not discovered by plaintiff, Mary Isabelle Buick, formerly Mary Isabelle Boyd, until the month of June, 1912, in the following manner: That on or about December, 1910, plaintiff, Mary Isabelle Buick, formerly Mary Isabelle Boyd, rented the real property described in said declaration of homestead, which included the west half of the northwest quarter of the northeast quarter, and the northeast quarter of the northwest quarter of section 11, township 30 north, range 7 west, M. D. M., in the county of Shasta, state of California, to one W. W. Sublett, and the said W. W. Sublett thereafter paid rent for the same to said plaintiff; that in the month of June, 1912, the said defendant, Benjamin F. Boyd, notified the said W. W. Sublett that he, the said defendant, was entitled to the rent for the said northeast quarter of the northwest quarter of said section 11; that said W. W. Sublett immediately thereafter informed said plaintiff that said defendant claimed the rent for the said northeast quarter of the northwest quarter of said section 11, and claimed title to the same; that immediately thereafter said plaintiff examined said agreement, and discovered that the mistake in description hereinabove set forth had been made in said agreement. That prior to the said month of June, 1912, said plaintiff was not aware, and had no knowledge, that the aforesaid mistake in description had been made in said agreement."

It is not seriously contended that the evidence was insufficient to support these findings. If there was any evidence to the contrary, it was appellant's duty to point it out in his brief, which he has not done. (Code Civ. Proc., sec. 953c.)

We have read the record of the evidence and find it amply sufficient to sustain the findings.

It appeared that the parcel of land misdescribed did not, when the agreement was entered into, belong to either of the parties, while the parcel which the court found was intended to be described was a part of the homestead declared by defendant in 1902, while the northwest quarter of the northwest quarter of said section, which included the misdescribed parcel awarded to defendant, was deeded to him by the Central Pacific Railroad Company in July, 1909. The evidence showed that the intention of the parties was that the property described in the homestead should go to plaintiff in the divorce action.

The only controverted question in the case is presented in appellant's proposition above quoted.

The rule, as stated in the Code of Civil Procedure, section 1911, is as follows: "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto." It was competent for the parties in the divorce action to adjust their property rights without the intervention of the court, and in doing so they expressly declared their object to be the settlement of "disputed claims to the property in controversy and withdrawing the same from the consideration of the court." The court in its decree determined nothing more than that the "property be awarded to the respective parties in accordance with said agreement." There was no longer any issue as to the property, nor was it necessary for the court to make any determination of the matter. The action of the court did not, in our opinion, amount to such an adjudication as is contemplated by the statute, nor did it constitute a bar to the present action. It added nothing to the validity or force of the agreement. There were in fact but two questions remaining for the court to determine, to wit, whether plaintiff was entitled to the decree of divorce and to whom the custody of the minor children should be awarded. "A former verdict is conclusive only as to facts directly and distinctly put in issue and the finding on which is necessary to uphold the judgment." (1 Freeman on Judgments, sec. 257.) Where the record on its face shows that an issue before the court was withdrawn from consideration, the presumption that it was adjudicated no

longer applies. (*Coburn v. Goodall*, 72 Cal. 498, 506, [1 Am. St. Rep. 75, 14 Pac. 190].) If a question is not in issue, it is immaterial that it is passed upon in the opinion of the court rendering the judgment. (15 R. C. L., p. 919.)

That the court and the parties treated the agreement as withdrawing the property rights from the court is shown by the fact that the agreement disposed of certain cattle to the plaintiff in the action and certain real property to the defendant of which no mention is made in the decree. This issue of property rights having been withdrawn, the present action cannot fairly be said to be an attack upon the judgment of divorce. "The rule undoubtedly is," as said by Mr. Justice Lorigan in *Southern Pacific Co. v. Edmunds*, 168 Cal. 415, 418, [143 Pac. 597, 598], "that a former judgment between the parties to an action is conclusive in all subsequent actions involving the same question, not only as to the matters actually decided in the former controversy, but as to all matters belonging to the subject of the controversy and properly within the scope of the issues which also might have been raised and determined." But as to matters which might have been litigated and decided as within the scope of a former suit, but which were not actually or expressly in issue and adjudicated, the learned justice said: "Only a presumption is indulged in that they were decided. This presumption is, however, a disputable one and may be overcome by showing that although a particular matter was involved in the former action, it was by consent of the parties withdrawn from consideration at the trial and did not at all enter into or constitute any part of the verdict of the jury or final determination of that action." In point of fact, and it so appears from the face of the record, the property described in the complaint in the divorce action, and in the agreement and referred to in the decree did not include the parcel now involved, and the disposition of the latter was, therefore, not an issue in the original action, and on the face of the record, the judgment would appear not to be a bar, for there was no adjudication as to it. If the rule be invoked that this parcel was a matter "belonging to the subject of the controversy and properly within the scope of the issues which also might have been raised and determined," the answer is that neither party discovered the mistake in the description of the property, and both parties

by mutual mistake assumed the description to be correct. The present action is different from the original action, and the rule is that in such case the judgment in the first action operates as an estoppel only as to those matters actually litigated and determined and not as to matters which might have been litigated. In *Freeman v. Barnum*, 131 Cal. 386, 389, [82 Am. St. Rep. 355, 63 Pac. 691, 692], Mr. Justice Temple stated the rule to be that "if the point or matter of fact has by them [the parties] or those to whom they are privy in estate been once distinctly put in issue and solemnly found against them, they are precluded from contending to the contrary. But this estoppel in actions upon a different cause of action only extends to matters actually litigated and determined, and not to questions involved and defenses which might have been but were not made." In the case of *More v. More*, 133 Cal. 489, [65 Pac. 1044, 66 Pac. 76], plaintiff Wallace More executed a deed purporting to convey to Thos. More all the interest of the former in the estate of A. P. More, deceased, and he also addressed a letter to the judge sitting in probate and to the administrator of said estate authorizing the distribution of said interest to said grantee. Accordingly, the court determined the rights of the parties under section 1664 of the Code of Civil Procedure. The suit was brought to annul the deed from Wallace to Thomas More. The judgment in the superior court was pleaded as an estoppel. Said the court: "Assuming the court to have jurisdiction, its judgment would be conclusive only as to the matter actually litigated. (Citing cases.) In the case at bar the matter now involved was not before the court." (Fraud in obtaining the deed from Wallace More was the issue.) "The judgment was entered on the written order or stipulation of Wallace More, obtained along with the deed of April 27, 1894, and tainted with the same fraud. It added nothing to the force of that document and the accompanying deed. Hence it is immaterial whether the court had or had not jurisdiction to determine the questions now under consideration. It is sufficient that those questions were not submitted to it." We can see no reason why the rule should not apply in a case of mutual mistake as well as where the issue is fraud. Relief in both cases addresses itself to the equity side of the court. It is very clear that in the present case the question of the alleged mistake was not before the court in the divorce action and was not litigated. Speak-

ing of the identity of causes of action, Mr. Freeman says: "The cause is the same when the same evidence will support both actions or rather, the judgment in the former action will be a bar, provided the evidence necessary to sustain the judgment for plaintiff in the present action would have authorized a judgment for him in the former." (Freeman on Judgments, sec. 257.) Had the evidence of the mistake been before the court, or had it been known when the agreement was made, it is quite clear that a correct description of the land would have found its way into both the decree and the agreement. It would, to our minds, work a miscarriage of justice to allow the rule of *res adjudicata* to step in here and defeat the action. Neither the facts nor the exigencies of the case would justify the court in permitting this to be done.

The judgment is affirmed.

Hart, J., and Burnett, J., concurred.

---

[Crim. No. 419. Third Appellate District.—June 14, 1918.]

THE PEOPLE, Respondent, v. NICK EANTOSCA,  
Appellant.

**CRIMINAL LAW—ASSAULT WITH DEADLY WEAPON WITH INTENT TO COMMIT MURDER—EVIDENCE—CERTAINTY OF WITNESS AS TO IDENTIFICATION OF DEFENDANT—ARGUMENTATIVE QUESTION—EXCLUSION OF ANSWER HARMLESS ERROR.**—In a prosecution for assault with a deadly weapon with intent to commit murder, where the prosecuting witness positively identified the defendant, the latter was not prejudiced by the refusal of the court to permit an identifying witness to answer the question as to whether he would be as sure about identification if the defendant were on trial for murder.

**ID.—BROKEN SHOVEL AND CLUB—ADMISSIBILITY.**—In such a prosecution, where the sheriff identified a broken shovel and a club as having been found at the place of the assault and the prosecuting witness stated that he thought he was struck with such weapons, which bore blood-stains, such weapons were admissible in evidence.

**APPEAL** from a judgment of the Superior Court of Amador County, and from an order denying a new trial. Fred V. Wood, Judge.

---

The facts are stated in the opinion of the court.

Ernest B. D. Spagnoli, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

CHIPMAN, P. J.—Defendant was convicted of the crime of assault with a deadly weapon with intent to commit murder. He moved for a new trial, which was denied, and he was thereupon sentenced to imprisonment in the state prison for the term of fourteen years. Upon the facts, the defense was an *alibi*. The proof of the *alibi* consisted of the testimony of the defendant and his brother, both of whom testified that they were at their cabin not far from the scene of the assault the entire evening and until after 10 o'clock of the twenty-sixth day of April, 1917. The assault was made about fifteen minutes before 10 o'clock. If the evidence was sufficient to support the verdict, it necessarily disposes of the *alibi* adversely to defendant. The evidence, we think, justified the verdict.

The prosecuting witness, August Chiesa, was a miner and was working on the night shift, from 10:30 P. M. until 6:30 in the morning, at the Bunker Hill Mine, Amador County. He testified that he left his lodging place about fifteen minutes to ten on the night of the assault and reached a point about one hundred feet from the mine. "Q. Just tell the jury what happened then. A. When I was there by the mine, Nick Eantosca was in front of me and I recognized him well. As soon as I raised my head up, I looked at him and I saw it was him and he hit me right away. The first hit that he gave me, I did not fall. I raised my hand up and hit him in the face, but I don't know what point I got him in the face. At the same time I hit him with my hand in the face; I had my lunch basket. The lunch bucket go out of my hand and it go on the ground. When I left my bucket fall on the ground, I turned and saw somebody behind me and at the same time they hit me with something; I thought it was— Mr. Spagnoli: We ask that that be stricken out—a conclusion of the witness. Mr. Snyder: It was the witness' best judgment. The Court: Do you know what he hit you with? A. I was not sure; it was only I heard something fall on the ground and I

thought it was the sound of— The Court: That may go out as to what he thought it was. Mr. Snyder: Then what happened? A. Then I fell on the ground and then I saw that both of them was there and both of them hit me. I did not holler or I did not talk. When I was down on the ground, I had my face looking at the ground, on the ground, and my arm like this [indicating] and then they used something, maybe a — and they hit me on the back four or five times. Mr. Spagnoli: I ask that answer be stricken out, a conclusion of the witness. A. I think they hit me with a — because I felt the hit right on my back. Mr. Spagnoli: I think the witness should be instructed not to give his conclusions. The Court: What he thought may go out. A. When I remained there about a minute like a dead man, I saw the partner of Nick Eantosca going away, and Nick Eantosca, when I had my arm like this [indicating], I was not unconscious, I saw Nick Eantosca take the razor out of his pocket and cut me right here [indicating neck]. When I was there and I know what I was doing, I raised my arm up so he could not cut me down lower. Q. Did he cut you with the razor? A. Yes, he did. Q. Where? Show the jury where you were cut with the razor. A. [Indicates.] The Court: Q. You say the defendant here is the one that cut you? A. Yes, I am sure it was Nick Eantosca. Q. You say there were two men there; did each of them hit you with something? A. Yes, both of them hit me, but who used the razor was Nick Eantosca. Q. The defendant in this case is the one who used the razor? A. Yes, this fellow [indicating Nick Eantosca].”

Dr. G. L. Lynch was called to treat Chiesa that night. “Q. State what you found in the way of wounds. A. I found a long cut on the left side of the neck and a number of bruises on his back and his right arm, and one or two on the top of his head.”

Witness Cassassa testified that he saw defendant and another man going toward the Bunker Hill mine and in the vicinity of the place of the assault, after 9 o'clock. The witness was cross-examined at considerable length, the purpose being to discredit his testimony that he was where he testified he was and recognized Eantosca. “Q. Now, you are absolutely sure that this is the man you saw? A. Sure, he is him. Q. You are absolutely certain about it—no possibility about it being someone else? A. I no make a mistake. Q. Is there



any possibility of your making any mistake? The Court: He can't make it any more definite. Q. If this man was on trial for murder, would you be just as sure? Mr. Snyder: I object. This is arguing with the witness and going into speculation. The Court: Objection sustained." The ruling is assigned as error. The defendant was on trial for assault with intent to commit murder. It is not at all likely that the witness could have been less certain of identifying defendant had the trial been for murder. It seems to us that the learned counsel subjected the witness to all reasonable tests to discover whether or not he was sure he was not mistaken. We do not think defendant was prejudiced by not having the benefit of an answer to the question.

Sheriff Lucot went to the scene of the crime about twenty minutes after 10 o'clock. He found there "a broken shovel and a club about two and a half or three feet long." He found on both the shovel and club what he described as "blood on them dried up," the blood-stains plainly visible. The club was broken in three pieces. The witness put the pieces together "and tied them to keep them together." Over defendant's objection, the court admitted in evidence the shovel and pieces of the club. The place where the assault was committed was first pointed out to the sheriff by a witness who was not present at the time the assault was made, but was there shortly after, and Chiesa the next morning took the sheriff to the spot. The evidence was sufficient to show that the pieces of the club and the shovel were found at the place where the assault occurred. The character of the wounds inflicted and the admitted testimony of Chiesa as to the circumstances and as to what he observed and heard sufficiently justified making these articles exhibits in the case.

On the cross-examination of defendant's brother, who testified for defendant, the district attorney was permitted, over defendant's objection, to inquire of the witness why he had quit work at the Kennedy mine at Jackson (six miles from Amador City) to come to the Bunker Hill mine, where his brother, the defendant, was working. The inference which the district attorney claimed might be drawn from the circumstance was that defendant's brother changed his place of work to be where he could aid defendant in making the assault. The witness, however, testified that he made the change because he could get better pay at the Bunker Hill mine than at the Ken-

nedy. As there was no evidence that the witness was the "other man" in making the assault, the testimony was immaterial, but we cannot see that defendant was prejudiced by the ruling.

The judgment and order denying motion for a new trial are affirmed.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 12, 1918.

---

[Civ. No. 2428. First Appellate District.—June 14, 1918.]

CHARLES UHTE, Appellant, v. B. B. ROSENTHAL et al.,  
Civil Service Commissioners, etc., Respondents.

**MUNICIPAL CORPORATIONS—PROMOTION UNDER CIVIL SERVICE—NOTICE OF EXAMINATION—RATING "UPON MERITORIOUS ACTS"—SAN FRANCISCO CHARTER.**—Under section 8 of article XIII of the charter of the city and county of San Francisco, providing for promotion under civil service based on "ascertained merit," the giving by the board of police commissioners of a notice of examination wherein it was said that rating would be "upon meritorious acts" does not show an intent not to promote on a basis of ascertained merit, since there is no distinction between the two terms.

**Id.—CONDITION OF PROMOTION OF POLICEMEN—FILING OF WRITTEN CLAIM OF MERITORIOUS ACTS.**—In arranging for promotion of policemen of the city and county of San Francisco, a member of the department could not complain that the commissioners required, as a condition to promotion, that a claim of meritorious acts in writing be filed and verified by the chief of police, since it was proper for the board to investigate the acts of policemen seeking promotion.

**Id.—STATE CIVIL SERVICE ACT—ESTABLISHMENT OF RECORDS OF INDIVIDUAL EFFICIENCY—PROVISION INAPPLICABLE TO SAN FRANCISCO COMMISSION.**—The provision of the State Civil Service Act (Stats. 1913, p. 1035) directing "the state commission to establish in all offices and places of employment records of individual efficiency of holders of positions in performing their duties," is not binding upon the Civil Service Commission of the city and county of San Francisco.

**ID.—STRIKING OF NAMES FROM ELIGIBLE LIST—RIGHT OF CIVIL SERVICE COMMISSIONERS—OTHER PROVISIONS NOT CONFLICTING.**—The provision of section 10 of article XIII of the charter of the city and county of San Francisco permitting the Civil Service Commission to strike names from the eligible register after they have remained thereon more than two years is not in conflict with other charter provisions relating to civil service.

**ID.—APPLICABILITY OF RULE OF STATUTORY CONSTRUCTION.**—The rule that all parts of a statute must be construed so as to be effective applies to the construction of municipal charters.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. Geo. E. Crothers, Judge.

The facts are stated in the opinion of the court.

Edward F. Moran, for Appellant.

Percy V. Long, City Attorney, and Maurice T. Dooling, Jr., Assistant City Attorney, for Respondents.

**BEASLY, J., pro tem.**—The plaintiff is a policeman of the city and county of San Francisco. Pursuant to a civil service examination which he passed on January 22, 1910, his name was placed on the eligible list for promotion from policeman to corporal of the police force. He participated in another examination conducted by the respondents, who are members of the Civil Service Commission of the city and county, on January 8, 1916, and he brings this suit to enjoin the commission from removing his name and that of seven other policemen in whose interest he prosecutes this action from the existing eligible list for corporals, without notice and hearing, and to restrain the commission from examining and rating the papers of the applicants who participated in the examination of January 8, 1916, and from adopting an eligible list based on that examination.

It must be conceded that by the charter of San Francisco the civil service commissioners must provide for promotion in the classified service on the basis of ascertained merit and standing upon examination. (Charter, sec. 8, art. XIII; Stats. 1913, p. 1602.) It is contended by plaintiff, who is the appellant here, that the commission threatens to ignore the element of ascertained merit in placing names on the new eligible list for promotion. "The plan of promotion," says

appellant, "is fully outlined in the notice of examination, and nothing is said therein of an allowance in any way for ascertained merit of applicants, and the commission do not propose to make any such allowance."

In this notice, under the head of "Meritorious Public Service," it is provided that credits not exceeding twenty will be allowed for acts of merit as in the judgment of the commission may seem just and proper; eighty credits will be allowed for a clean record as a member of the department, subject to deductions, according to a carefully prepared and elaborate schedule, for exceeding authority, insubordination, neglect of duty, assault, cowardice, intoxication, and other minor offenses. The appellant seems to contend that meritorious acts, as used in connection with this notice of examination, are not equivalent to "ascertained merit" as used in the charter. But we can see no distinction between the meaning of those terms as used in the two instruments; and undoubtedly the purpose of those statements in the notice was to provide a method for ascertaining the merit of the candidate for a place upon the eligible list for promotion. It is also provided in this notice that the applicants claiming credits for meritorious acts must present their claims before 1:30 P. M. of the day of the examination, namely, on January 8, 1916, in writing, so that they may be verified by the chief of police. Of this the petitioner complains. We can see no merit in his objection to this method of checking up his statement as to his merits. It is argued that a fund is provided by the city for the commission to use in determining "ascertained merit," presumably by some sort of surveillance of members of the police force who may become or are applicants for positions upon the eligible list. Even so, this does not preclude the verification of the statement of the applicant as to his merits by the chief of police for the benefit of the commission.

Appellant also contends that "ascertained merit" is fully defined in the fifth subdivision of the State Civil Service Act (Stats. 1913, p. 1035; Deering's General Laws, p. 182), and that in the absence of a better definition this is binding upon, or at least should be adopted by, the Civil Service Commission in the premises. "That subdivision," says appellant, "directs the state commission to establish in all offices and places of employment records of individual efficiency of holders of positions in performing their duties." This section of

the Civil Service Act is not binding upon the Civil Service Commission of the city and county of San Francisco; but even assuming that this would be a proper method of procedure, the records of the chief of police of San Francisco and of the police department thereof open to him will undoubtedly furnish material for a report by the chief upon any claim of merit made by any police officer seeking promotion to the position of corporal, or that his name be placed upon the eligible list for such promotion; and, as we have said, there is no reason why the commission may not use the chief of police, his knowledge, and his acquaintance with the records of his department, to assist it in ascertaining, in connection with the statement of the applicant himself, his merit to a place upon the eligible list. Of course, we do not mean to hold that the chief's report would be necessarily and absolutely binding on the commission.

In view of what we have said, there is no merit whatever in the contention of petitioner that the Civil Service Commission have announced negatively by omission that no consideration will be given to ascertained merit, and that an eligible list will be adopted without that important factor as a basis. The published conditions of the examination show that the commission intends to give full weight to ascertained merit, the same to be learned by the commission under a system and to be marked according to a schedule of credits which seem to be perfectly fair and just.

Another contention of appellant is that the Civil Service Commission have no right to strike names from the eligible register arbitrarily. The present eligible list, upon which appellant's name appears and from which he alleges that the commission threatens to remove it, was made up in the year 1910 upon an examination by the commission conducted in that year. This appears from plaintiff's complaint herein. Article XIII, section 10, of the charter, contains the following provision: "The commissioners may strike off the names of candidates from the register after they have remained thereon more than two years." This eligible list being more than two years old, the commission had authority under this provision of the charter to strike appellant's name therefrom.

It is contended that this provision of section 10 is in conflict with the provisions of other sections of the charter. We have examined these other provisions, and see no necessary

conflict between the power given to the commission by the words quoted from section 10, and the limitations upon the authority of the commission contained in other sections of the charter. The well-recognized rule of statutory construction, that all parts of a statute must be construed so as to be effective, applies here; and the case of *Bannerman v. Boyle*, 160 Cal. 197, [116 Pac. 732], relied upon by appellant in this behalf, has no application to the authority of the commission in the case at bar.

Finally, we see no abuse of discretion in the proceedings of the board of commissioners as indicated by the allegation of the complaint in this action. A general demurrer to this complaint, on the ground that it does not state facts sufficient to constitute a cause of action, was correctly sustained; and the judgment against appellant following his refusal to amend his complaint after the order sustaining this demurrer was, therefore, correct, and is affirmed.

Kerrigan, J., and Zook, J., *pro tem.*, concurred.

---

[Civ. No. 1818. Third Appellate District.—June 14, 1918.]

IRVING D. GIBSON et al., Appellants, v. COUNTY OF SACRAMENTO, Respondent.

COUNTIES—LEGAL SERVICES—PROSECUTION OF DISTRICT ATTORNEY FOR MISCONDUCT—COUNTY CHARGE.—In view of section 4307, subdivision 3, of the Political Code, services rendered by attorneys at law appointed by a judge of the superior court to prosecute a district attorney for misconduct in office, pursuant to the provisions of sections 758 and 771 of the Penal Code, constitute a "county charge."

Id.—CLAIM AGAINST COUNTY—STATUTORY AUTHORIZATION.—One who demands payment of a claim against a county must show some statute authorizing it, or that it arises from some contract, express or implied, which finds authority in law.

APPEAL from a judgment of the Superior Court of Sacramento County. Charles O. Busick, Judge.

The facts are stated in the opinion of the court.

Ralph W. Smith, and Irving D. Gibson, for Appellants.

Hugh B. Bradford, District Attorney, and J. R. Hughes, Deputy District Attorney, for Respondent.

HART, J.—The complaint alleges: The plaintiffs are attorneys at law, engaged in practice at the city of Sacramento; that on the first day of June, 1917, an accusation in writing against Hugh B. Bradford, district attorney of the county of Sacramento, was presented by the grand jury of said county, pursuant to the provisions of section 758 of the Penal Code, which was filed with the county clerk and presented to Honorable Malcolm C. Glenn, judge of the superior court of said county, who, on the seventeenth day of June, 1917, appointed plaintiffs as prosecuting officers in the matter of said accusation, pursuant to the provisions of section 771 of the Penal Code; that plaintiffs accepted said appointment, qualified as such prosecuting officers, and performed all necessary services and duties in the matter, and that said services were rendered at the special instance and request and for the benefit of said defendant; that the fair and reasonable value of said services is the sum of one thousand four hundred dollars; that plaintiffs presented to the board of supervisors of said county their claim and demand for said sum of one thousand four hundred dollars, duly authorized and approved by said judge, which was rejected by said board. A general demurrer to the complaint was sustained without leave to amend and judgment was entered in favor of defendant, from which judgment plaintiffs appeal.

Section 758 of the Penal Code reads as follows: "An accusation in writing against any district, county, township, or municipal officer, for willful or corrupt misconduct in office, may be presented by the grand jury of the county for or in which the officer accused is elected or appointed."

Section 771 of said code is as follows: "The same proceedings may be had on like grounds for the removal of a district attorney, except that the accusation must be delivered by the foreman of the grand jury to the clerk, and by him to a judge of the superior court of the county, who must thereupon appoint someone to act as prosecuting officer in the matter, or place the accusation in the hands of the district attorney of

an adjoining county, and require him to conduct the proceedings."

The sole question presented for decision is, Do such services as were rendered by plaintiffs constitute a county charge?

Section 4307 of the Political Code declares what are county charges, and subdivision 3 thereof reads as follows: "The expenses necessarily incurred in the support of persons charged with or convicted of crime and committed therefor to the county jail, and for other services in relation to criminal proceedings for which no specific compensation is prescribed by law."

It cannot be doubted that "one who demands payment of a claim against a county must show some statute authorizing it, or that it arises from some contract, express or implied, which finds authority of law." (*Irwin v. County of Yuba*, 119 Cal. 686, [52 Pac. 35]; *Woods v. Potter*, 8 Cal. App. 41, 45, [95 Pac. 1125].) Nor may the payment of such a claim be allowed upon the theory that the services performed for which compensation is claimed were beneficial. There must be some statutory or constitutional authority for compensation for services rendered to a county, otherwise it cannot legally be paid, however beneficial the services performed may be to the county or the public generally. Unless, therefore, the services performed by the appellants and for which they are here seeking compensation come within the language or the contemplation of subdivision 3 of section 4307 of the Political Code, no recovery can be had for such services, it being conceded that there is no other law or provision of law authorizing payment of compensation for such services.

It follows that whether the appellants are entitled to compensation for the services named must be determined upon what is ascertained to be the true meaning or the legislative intent at the bottom of the language of said subdivision 3, viz.: "And for other services in relation to criminal proceedings for which no special compensation is prescribed by law." Originally, that language was contained in section 4344 of the Political Code, being embraced in subdivision 3 thereof, which then read as follows: "3. The compensation allowed by law to sheriffs and constables for executing process on persons charged with criminal offenses; for services and expenses in conveying criminals to jail; for services of subpoena issued by district attorneys, and for other services in relation



*to criminal proceedings for which no specific compensation is prescribed by law.*" (See Newmark's Pol. Code, 1889.) It is very clear that the language herein italicized and which, as seen, is now a part of subdivision 3 of section 4307 of said code, originally had reference to the compensation to be paid to sheriffs and constables for services which might be performed by them and not enumerated and for which no specific compensation was prescribed. But, in amending certain sections of the Political Code relating to the compensation of county officers, the legislature, as seen, placed the provision as to services not specially enumerated and for which no specific compensation has been provided in an entirely different connection from that in which it was formerly or originally used. As the provision now stands, we find it, as it was before, under the heading, "Other County Charges," and employed in a connection to which it does not appear to have natural or relevant application. The two sentences in the subdivision, although conjoined by the conjunctive word "and," seem to relate entirely to different and dissimilar subjects, the one involving expenses necessarily incurred in supporting persons charged with or convicted of crime and committed therefor to the county jail, and the other involving other services in relation to criminal proceedings for which no specific compensation is paid. Obviously, the matter of the support of the persons mentioned in the subdivision is not a "criminal proceeding" within the meaning of that phrase as it is used and referred to in our law. A "criminal proceeding" means some authorized step taken before a judicial tribunal against some person or persons charged with the violation of some provision of the criminal law. The support of those charged with or convicted of crime and who are lawfully incarcerated in the county jail therefor is a duty which the state or the county, its agent, is required to discharge, and while it is true that the county officer whose duty it is under the law to provide such support performs services for the county, when furnishing such persons with necessary support, still such services cannot correctly be said to be performed in relation to a "criminal proceeding" within the true juridical meaning of that phrase. It follows, therefore, that the words "other services" as used in the subdivision cannot justly or reasonably be held to refer to "services" like or similar to those referred to in the sentence immediately preceding that con-

taining those words. Indeed, we are unable to conceive of any other services which would be involved in the support of the persons referred to than those specifically mentioned. "Support," in the sense in which that word is used in the subdivision, necessarily means that the persons referred to therein are to be provided with such necessities as may be required to sustain them under the peculiar conditions by which they are surrounded, including, of course, such necessary medical treatment as may be required, and when such support is provided, there are left no other conceivable services to be performed in that connection. Moreover, there is nothing in the entire subdivision indicating that the "other services" are to be performed by a particular county officer or any particular person. The provision simply declares, in effect, that any other services than those specifically enumerated by the law for which no specific compensation is provided, by whomsoever performed, shall be and constitute a charge against the county. The provision means and was intended to mean something, for that particular language was retained as a part of the law, while the part in connection with which it originally appeared in the Political Code was either entirely eliminated from the code and some other provision for the compensation of sheriffs and constables substituted therefor or was re-enacted in some other connection.

Our conclusion is that there is no natural or logical connection between the two sentences in said subdivision—that is to say, that the language, "and for other services in relation to criminal proceedings for which no specific compensation is prescribed by law," has no reference or application to the language in the same subdivision immediately preceding it or to any of the preceding subdivisions, but that said language was retained as a part of the law to operate as an independent, substantive provision thereof, to cover or meet contingencies which, it was conceived by the legislature, from common experience, might arise, and require the incurring of expense in the prosecution of criminal cases and which human prescience is unable to foresee, so that specific provision for the expenses arising may be made. And, that the provision, in its present form and connection, was designed, *ex industria*, to meet just such cases as the one before us and its language broad enough to include services of the character of those for which the appellants claim the right to be compensated by the county, we

are in no doubt. If this be not true, then why is the provision in the code? What other kind of services is contemplated by or included within that language? Certainly it must be assumed that the provision was enacted and inserted in the code for some purpose. What is that purpose if it be not to provide for the compensation for services such as the appellants performed? Of course, it will not be questioned that an action growing out of either section 758 or section 772 of the Penal Code is a criminal proceeding, and that, therefore, the services performed by the appellants were "in relation to criminal proceedings." (See Pen. Code, sec. 682; *In re Marks*, 45 Cal. 199; *In re Curtis*, 108 Cal. 661, 662, [41 Pac. 793]; *Matter of Shepard*, 161 Cal. 171, 174, [118 Pac. 513]; *People v. McKamy*, 168 Cal. 531, 533, [143 Pac. 752]; *State ex rel. McGrade v. District Court*, 52 Mont. 371, [157 Pac. 1157, 1158].)

The respondent, opposing the above construction of the provisions of the Political Code under consideration, undertakes to establish an analogy between a case where the court, exercising the authority conferred upon it by section 771 of the Penal Code, appoints an attorney to prosecute a district attorney on an accusation filed against him under either section 758 or section 772 of said code and the case in which the court is authorized by section 987 of the same code to name or assign an attorney to represent and defend the accused where the latter is himself without means to employ counsel and desires the court to assign counsel to defend him. But we perceive no such resemblance between the two cases as requires us to hold that the appellants must be denied compensation for the services performed by them upon the theory supporting the authority vested in trial courts by said section 987.

The central idea—indeed, the pole-star—of every system of laws (in civilized countries) is the preservation and protection of such natural rights of mankind as have not necessarily been surrendered or given up in return for the benefits which men receive from organized society, and surely that system which has failed to provide for the full and complete protection of all the rights of person and property to which every member of organized society, whether rich or poor, when measured by the material things of life, is entitled, would fall woefully short of that degree of perfection which it is possible for man-made government to attain. Our state constitution

has, therefore, specially covered this matter with respect to persons charged with crime. In section 13 of the first article of that instrument it is provided, among other things, that, in criminal prosecutions, "in any court whatever," the party accused shall have the right to appear and defend "in person and with counsel." The federal constitution (article VI) contains a like guaranty. Of course, the right so guaranteed would involve the granting of a special privilege to a particular class if the right to its exercise were confined to those persons charged with crime having the financial ability to employ and compensate counsel—a situation wholly at variance with the fundamental idea and the general spirit of our systems of state and federal governments as outlined by their respective constitutions—and, therefore, in this state, to the end that all men in all circumstances shall have the equal protection of the law, as our constitution commands, the legislature has enacted section 987 of the Penal Code, whereby the trial courts are, as seen, vested with authority, in the case of an impecunious person prosecuted upon a criminal charge, to assign him counsel, selected from the membership of the local bar, to defend him without compensation, or to trust for compensation to the future ability and the disposition of the accused himself to pay for the services rendered. (*Rowe v. Yuba County*, 17 Cal. 62; *Iamont v. Solano County*, 49 Cal. 158.) The legislature, for obvious reasons, has made no provision for payment for services rendered by an attorney in such a case, although it undoubtedly has the right to make such services a county charge, to be compensated for out of the treasury of the county. Of course, neither in the case of an attorney assigned by the court to defend an impecunious accused, nor in a case where an attorney is appointed by the court to prosecute the district attorney against whom an accusation has been filed, is there any contractual relation thereby or otherwise created or arising between the attorney so assigned or appointed and the county, since the county is not a party to either action and does not control the prosecution of either case, the prosecution in both instances being for the benefit of the county only in so far as it is part of the state, in the name of the people of which, and not of the county, the proceeding in both cases is prosecuted. Therefore, there can be no implied *assumpsit* against the county—no obligation on its part to pay (*Case v. Board of Commissioners*, 4 Kan. 511, [96 Am. Dec.

190]), notwithstanding that the legislature, in the exercise of due authority, has made the expenses incurred in public prosecutions charges against the county. In brief, as stated, the whole matter of compensation in either case rests upon the proposition whether there is or is not a statute authorizing payment for the services rendered therein by an attorney assigned or appointed by the court to defend or prosecute the accused, as the case may be.

But, as above intimated, the authority given to superior courts to appoint an attorney to conduct the prosecution of a district attorney against whom an accusation has been filed does not proceed from the theory upon which like authority may be exercised in assigning an attorney to defend a pauper charged with and prosecuted for a crime. The county is not an indigent, but is amply able to compensate (and as of right should compensate) an attorney who is required to perform services which, under other circumstances, it is the duty of the district attorney to perform, and for which the latter is compensated. Naturally enough, therefore, the legislature would, in such a case, make provision for compensating an attorney for services which the law compels him to perform, whether he desires to perform them or not.

There is, as we read the decision, nothing said in the case of *State ex rel. McGrade v. District Court, supra*, in conflict with the views above expressed. In that case, under a statute substantially similar in its provisions to section 771 of our Penal Code, the trial court, in a proceeding in which an accusation had been presented and filed against the district attorney, appointed the district attorney of an adjacent county to conduct the prosecution. The latter asked and sued for compensation for his services, but he was denied the right to compensation upon the ground, as stated by the supreme court of Montana, that he had merely performed a duty in prosecuting the case that the law had placed upon him as a district attorney and that the compensation allowed him by law as district attorney covered payment for all services performed as such by him, including services in such a case. The ruling in that case appears to be perfectly sound but it does not fit this case. Under section 771 of our code, the court could have appointed a district attorney of one of the counties adjoining Sacramento to prosecute

the accusation in this case, in which event what is said in the Montana case would apply here.

It is further argued that the superior court has no authority to incur an obligation against the county, but that such authority is alone vested in the board of supervisors, referring to section 4041 of the Political Code, which, in the enumeration of the powers of such boards, contains the following provision, designated as subdivision 16: "To direct and control the prosecution and defense of all suits to which the county is a party and by a two-thirds vote of all the members, may employ counsel to assist the district attorney in conducting the same."

The foregoing, as is to be noted, refers wholly to suits to which a county is a party, and, therefore, to civil actions. A county is in no sense a party to criminal cases, for they involve "no interest of the county in any sense, other than such interest as the county may have in common with any other county and all the people of the state, in upholding the administration of the law." (*County of Modoc v. Spencer*, 103 Cal. 498, 500, [37 Pac. 483]; *Conklin v. Woody*, 33 Cal. App. 554, [165 Pac. 973].)

The proposition, however, that there is no law authorizing a judge of the superior court to incur an obligation against or on behalf of the county is, in a general sense, quite true. But the right in the legislature to confer such authority upon the superior court or the judge thereof, when it may be essential to the proper transaction of the business of the court, cannot be questioned; and this right has been exercised by the legislature in the case of the employment and compensation of phonographic reporters of said courts. (See Code Civ. Proc., secs. 269, 274, 274a.) By those sections, the judges of the superior court are not only authorized to appoint and employ stenographic reporters to take down in shorthand and transcribe the proceedings of their courts, but are authorized to audit or order the payment of the claims of such reporters as for their compensation for the services so performed by them. Indeed, by section 869 of the Penal Code, justices of the peace, sitting as examining magistrates, are similarly authorized to order the payment of claims of shorthand reporters whom they have appointed to report the testimony and proceedings taken and had at preliminary examinations. And, in a case where, as here, an accusation has been filed against

the district attorney, the legislature has expressly conferred authority upon the superior court to appoint an attorney to prosecute the action. Whether such an appointment amounts only to a mere "assignment" of an attorney to represent the people in the action, as in the case of an attorney "assigned" to defend an impecunious person accused of and prosecuted for some crime, or is an employment in the sense that it places an obligation upon the county or the state to pay for the services of the attorney in the action, must, of course, depend upon whether the legislature has authorized payment out of the public treasury of compensation for such services. The legislature could, obviously, make such services a direct charge against the state and the compensation payable from state funds. On the other hand, it is clearly within the power of the legislature to make such services a charge against the county, as it has made all other expenses growing out of criminal prosecutions charges against the county, and, as declared in the outset of this opinion, we think that this is precisely what the legislature intended to do and has done by the language of subdivision 3 of section 4307 of the Political Code.

The suggestion that the construction herein given subdivision 3 of section 4307 may result in a heavy drain on the county treasury is, of course, no argument against such construction of said section. A proceeding against a district attorney such as the one before us rarely arises, and we may add (more as the opinion of the writer than that of the court) that, if having no stronger reason, legal or moral, for its support than that which prompted this proceeding, no such a move should be made against a public officer, for under such circumstances its result can only be to harass and annoy without the slightest justification a public official who is trying to do his duty as the law lays it down. But, whether meritorious or justified or not, such a proceeding must be disposed of by the court before which it is pending in the manner and mode prescribed by the law, and, when against a district attorney, there is nothing left for the court to do but to appoint either the district attorney of an adjoining county or some other attorney to prosecute the proceeding—in other words, to perform services which, under other circumstances, it would be the duty of the district attorney himself to perform.

Our conclusion is: That the services performed by the appellants are among the "other county charges" contemplated

by subdivision 3 of section 4307 of the Political Code, and that compensation therefor by the county is authorized by the latter part of said subdivision of said section; that the claim for such services is one which must be passed upon by the board of supervisors, in which body is lodged the discretion of determining whether the services for which the claim is made have been performed, and, if so, whether the amount of the claim is or is not reasonable in comparison with the character of the services performed; that if the claim be rejected by the board, then the claimant may finally, as in the case of any other claim against the county and disallowed by the supervisors, either in whole or in part, have recourse to the courts for a judicial adjudication of the claim or the questions thereupon arising.

The judgment is reversed.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 12, 1918.

---

[Civ. No. 1582. Third Appellate District.—June 15, 1918.]

**EMIGH-WINCHELL HARDWARE COMPANY** (a Corporation), Appellant, v. **AMOS PYLMAN et al.**, Respondents.

**MECHANICS' LIENS—TIME FOR FILING—CONSTRUCTIVE COMPLETION OF BUILDING.**—Under section 1187 of the Code of Civil Procedure, as amended in 1911, any of the three following circumstances shall constitute constructive completion of a building, for the purpose of setting the time running for the filing of mechanics' liens, to wit: 1. Occupation of the building; 2. Acceptance of the building by the owner; and 3. Cessation from labor for thirty days.

**ID.—FAILURE TO FILE NOTICE OF COMPLETION—TIME FOR FILING LIENS.**—The last clause of section 1187 of the Code of Civil Procedure, providing that if notice of completion is not filed by the owner he shall be estopped in any foreclosure proceeding from maintaining any defense therein based on the ground that the lien was not filed in time, refers to the completion of the contract under



which the material was furnished or the labor done, and if such notice is not filed by the owner, he waives the thirty-day limitation provided by the section; but the ninety-day limitation in the concluding sentence of the section applies to all cases, and all claims of lien must be filed before the expiration of ninety days after the completion of the building, regardless of the filing of notice of completion.

**ID.—COMPUTATION OF TIME FOR FILING LIEN — DELIVERY OF HINGES AFTER COMPLETION.**—In determining whether a lien for material used in the construction of a building was filed in time, the delivery to the building about two months after its occupation by the owner of four special hinges of small value, previously ordered by the contractor and afterward paid for by the owner, cannot be taken into consideration.

**APPEAL from a judgment of the Superior Court of Yolo County.** W. A. Anderson, Judge.

The facts are stated in the opinion of the court.

Devlin & Devlin, for Appellant.

White, Miller, Needham & Harber, for Respondents.

**BURNETT, J.**—The action was against the owner and the contractor of a building for materials furnished for the use of said building, and for the foreclosure of a mechanic's lien. Plaintiff recovered judgment against the contractor for the amount of the claim, but judgment for costs was entered in favor of defendant Pylman, from which the appeal has been taken. The court found that the work on the building was begun in the month of October, 1913, "and was completed on May 2, 1914 . . . and was then and there occupied by said owner as completed, and at the same time the said defendant Pylman and his family moved into and occupied said building and began then and there openly and publicly to use and occupy the same as their place of residence, and they ever since have continued to so use and occupy said premises and to reside thereon."

It was also found that the owner had fully paid the contractor, and that the material was furnished by plaintiff at the instance and request of said contractor, but "that no materials furnished by the plaintiff were used in said building after the second day of May, 1914," although on the 10th of

July following plaintiff sent to said building four special hinges of small value, which had been previously ordered by the contractor, and they were afterward paid for by the owner. It was also found that plaintiff filed its claim of lien for record on August 8, 1914. Indeed, it was so alleged in the complaint and not denied. The court concluded "that the time to file liens for labor or materials furnished in the construction of said building began to run on the second day of May, 1914, and the time to file liens thereon expired on the thirty-first day of July, 1914, and prior to the filing of plaintiff's alleged lien."

As to the finding in reference to the completion of the building, there can be no possible doubt of the sufficiency of the evidence in its support. It was stipulated at the trial that the Pylmans were living in the house on April 28, 1914, and from that time continuously. Nellie Pylman testified that on the twenty-eighth day of April the contractor had everything done with the exception of putting on a few hooks on the screen doors and a very few little necessary things, and that this was attended to within a few days and that the building was then accepted by them. It appears, also, that on April 13th the owner and contractor had a settlement and at that time agreed to eliminate certain work from the contract, and deductions were made for the things omitted. This was in accordance with the provisions of the contract between the parties, and the evidence shows that the contract, as thus modified, was completely executed.

We have, therefore, not only constructive, but actual, completion of the building not later than May 2, 1914. As to the circumstances of occupation and acceptance of the building, section 1187 of the Code of Civil Procedure provides that: "In all cases, any of the following shall be deemed equivalent to a completion for all the purposes of this chapter": 1. "The occupation or use of a building, improvement, or structure, by the owner," or 2. "The acceptance by said owner or said agent, of said building, improvement, or structure." Hence, it is entirely clear that we cannot question the finding of the court that said building for all the purposes of filing a mechanic's lien was completed on May 2, 1914.

In reference to certain facts which the law declares to be sufficient to support the conclusion that the building for the purpose of a lien has been completed, it may be stated that the

statute has undergone certain changes, which are pointed out in various decisions of the courts. From 1887 to 1897 said section of the statute limited the operation of the *occupation* or *use* and *acceptance* to those cases wherein there was a duly recorded contract, the legislature having provided "and in case of contracts, the occupation," etc. In the latter year the section was amended so as to make *occupation* and *acceptance* apply to all cases, but a further amendment was added to the effect that either must be coupled with cessation from labor for thirty days in order to constitute constructive completion. These changes are fully discussed in *Robison v. Mitchel*, 159 Cal. 586, [114 Pac. 984], and we need not dwell upon them further. Then comes the amendment of 1911, which applies to cases wherein the contract *has not* as well as those whercin it *has been* recorded; and as clear as language can make it, the section now provides that any of the three circumstances shall constitute constructive completion, namely: 1. Occupation of the building; 2. Acceptance of the building by the owner; and 3. Cessation from labor for thirty days.

By a sort of metaphysical refinement, appellant seeks to make it appear that cessation from labor for the period of thirty days must still be added to the other circumstances above mentioned to constitute completion, but the section is too plain to admit of discussion. Indeed, it is pointed out in *Hughes Mfg. & Lumber Co. v. Hathaway*, 174 Cal. 48, [161 Pac. 1159], that the phrase "completion of the building," as used in the last clause of said section, "must be understood to mean either the actual completion or the completion by cessation of labor for thirty days upon the building, etc., or completion by occupation or acceptance, as the case may be."

The case is virtually as strong upon the theory of actual completion, since it was competent for the parties to provide for changes in the plans, and to so alter the contract, and thus to have a completely executed agreement. (*White v. Soto*, 82 Cal. 654, [23 Pac. 210]; *Gilliam v. Brown*, 116 Cal. 454, [46 Pac. 486]; *Anderson v. Johnston*, 120 Cal. 657, [53 Pac. 264].)

Nor is there any doubt as to the conclusion that plaintiff's claim of lien was filed too late.

It is to be observed that the materialman has thirty days after he ceases to furnish materials within which to file said claim, and upon the pretense of having furnished said hinges

on July 10th, plaintiff claims to have brought itself within this provision. But the concluding portion of said section requires "that all claims of lien must be filed within ninety days after the completion of any building, improvement, or structure," etc.

Appellant contends that this time limit was waived, for the reason that no notice of completion was filed by the owner. As to this appellant is in error.

Said section 1187 does indeed provide: "In case such notice be not so filed then the said owner and all persons derailing title from or claiming any interest through him shall be estopped in any proceedings for the foreclosure of any lien provided for in this chapter from maintaining any defense therein based on the ground that said lien was not filed within the time provided in this chapter." This refers to the completion of the contract under which the material was furnished or the labor done, and if notice of such completion is not filed by the owner, he waives the thirty-day limitation. (*Hughes Mfg. & Lumber Co. v. Hathaway, supra.*)

But the ninety-day limitation applies to all cases. The concluding clause of the section makes this plain: "Provided that *all claims of lien* must be filed within ninety days," etc.

Such is, also, the view taken by the courts. In the Robison case, *supra*, referring to the foregoing clause, the court said: "This would seem to fix a time limit within which all claims must be filed regardless of whether the owner has filed his notice of completion or not."

In the Hughes case, *supra*, it is declared: "If no notice of completion is filed, the claimant is required to see that his claim is filed before the expiration of the period of ninety days after the completion of the building, that is, of the building as a whole, as provided in the last clause of the section."

*National Lumber Co. v. Kennedy*, 28 Cal. App. 780, [154 Pac. 25], contains this declaration: "The legislature deemed such period ample time for otherwise obtaining information as to the time of completion. The provision that 'all claims of lien must be filed within ninety days after the completion of any building' could serve no purpose other than to terminate the time within which the claim of lien might be filed. Such is the plain import of the language used."

The foregoing ought to set the matter at rest, and no further comment is called for.

As to the last item furnished by appellant it should be said, further, that the hinges were never used in the building, and, therefore, they did not and could not furnish the basis for a lien, and, if no lien could be claimed for them, it logically follows that the time when they were delivered could not be taken into account in the determination of the question whether the notice of lien was filed within the statutory period.

"It is well settled by many decisions in this state that to entitle a materialman to a lien the materials must be furnished to be used, and must actually be used, in the construction of the building against which the lien is sought to be enforced." (*Stimson v. Los Angeles Traction Co.*, 141 Cal. 32, [74 Pac. 357].)

That the last item when not used in the construction of the building must be disregarded in computing the time is expressly held in *P. T. Walton Lumber Co. v. Cox*, 29 Okl. 237, [116 Pac. 798]. Therein, certain doors were ordered and delivered, but not used, and the supreme court of Oklahoma said that they constituted no proper item of charge on the lien statement, and that the date of the last item which was used was the one to be considered in the inquiry whether the material was furnished within the sixty-day period required by the statute.

Again, it appears that the order for the hinges was a separate, distinct, and independent contract or order from the other orders given, and, therefore, it could not affect in any way the right to file a lien for the other materials. The point is considered in the case of *Barrows v. Knight*, 55 Cal. 155. Other authorities of similar import are *Phillips on Mechanics' Liens*, 3d ed., secs. 324-327; *Lane & Bodley Co. v. Jones*, 79 Ala. 156; *Maryland Brick Co. v. Dunkerly*, 85 Md. 199, [36 Atl. 761]; *Brunt v. Farinholt*, 121 Md. 126, [88 Atl. 42]; *Cross v. Eyerley*, 86 Neb. 516, [125 N. W. 1085].

It seems equally plain that the hinges must be entirely eliminated from consideration, for the reason that payment in full was made for them and accepted. But to avoid confusion, we deem it proper to add that if the hinges had been used in the building in pursuance of a contract therefor, such circumstance would not save the lien upon the theory that the

claim was filed within thirty days thereafter. Indeed, the thirty-day requirement was waived, as we have heretofore seen. But if the hinges had been so used, such use might have been regarded as extending the time of the completion of the building so as to avoid the bar of the ninety-day period. In other words, under the circumstances suggested, the court would not permit the owner to say that the building had been completed prior to the use of said material, and, therefore, that the notice of lien was filed too late.

In the final brief, for the first time, appellant claims that the judgment must be reversed "for the failure of the court to find that the lien was not filed within thirty days after the plaintiff had ceased to furnish materials." In view of the fact that it does appear from the findings that said notice of lien was not filed within ninety days after the completion of the building, the said consideration would be immaterial.

However, appellant is in error in the statement. The court specifically finds when the materials were furnished, including the date of the last item, as appears in paragraphs 5 and 6 of the findings, and, also, when the notice of lien was filed. Thus is the point covered.

It seems hardly necessary to notice the cases cited by appellant as they are so easily distinguished from the one before us, but, we may refer to them briefly.

In *Yost v. Roux*, 27 Cal. App. 307, [149 Pac. 781], the materials for which the lien was claimed were actually used in the building, and the notice of lien was filed within ninety days of the completion of the building as found by the court. In fact, it was properly held by this court that, as to the materialman, the building was not completed until his materials were used, the main contention there being as to whether the liens should be filed within thirty days of the completion of the building or of the time when the claimant "ceased to furnish materials."

*Schwartz v. Knight*, 74 Cal. 432, [16 Pac. 235], has no similarity to the case at bar. Therein the filing of the notice of lien was held to be premature because the building had not been completed. Under the provisions of said section 1187, as it existed at that time, it was held that, as the plaintiffs were not original contractors, "the law required them to file their lien within thirty days after the completion of the building."

In *Willamette Steam Mills etc. Co. v. Los Angeles College Co.*, 94 Cal. 229, [29 Pac. 629], several interesting questions growing out of the mechanic's lien law are learnedly discussed, but the decision has no particular bearing upon the question involved herein. What was said in reference to said section 1187 of the Code of Civil Procedure must be regarded with the recollection of the fact that it was amended before this action was brought. Therein it was held that in the case of a contract not recorded a laborer or materialman, in order to perfect his lien, must file it within thirty days after the completion of the building, or after there had been a cessation of labor for thirty days upon the unfinished building.

In the case of *Boscus v. Waldmann*, 31 Cal. App. 245, [160 Pac. 180], decided by this court, it appears that the notice of lien was filed within ninety days after the completion of the building, and the discussion in reference to the notice to be given by the owner was addressed to the thirty-day provision of the statute.

We think the judgment should be affirmed, and it is so ordered.

Chipman, P. J., and Hart, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on July 15, 1918.

---

[Civ. No. 2276. Second Appellate District.—June 15, 1918.]

GREER-ROBBINS COMPANY (a Corporation), Respondent, v. PACIFIC SURETY COMPANY (a Corporation), Appellant.

**APPEAL—ALTERNATIVE METHOD—TYPEWRITTEN TRANSCRIPTS NOT REVIEWABLE.**—Appellate courts will not look to the typewritten transcripts filed under the alternative method of appeal, to determine whether ground exists for the reversal of the judgment appealed from.

**INSURANCE LAW—DEFENSE OF SUITS COVERED BY POLICY—DUTY OF INSURER.**—Where an indemnity policy provided that the insurer was to defend any suit against the insured to enforce a claim for dam-

ages covered by the policy, whether groundless or not, the insurer was required to defend every action in which the complaint showed a claim for damages covered by the policy, notwithstanding the suit was groundless and defeated, and where the insurer failed to defend, it was liable to the insured for the costs and expenses of the defense.

**ID.—ACTION ON POLICY—RECOVERY OF COSTS AND EXPENSES OF DEFENDING ACTION—SUFFICIENCY OF COMPLAINT IN LIABILITY ACTION—APPEAL—RECORD—PRESUMPTION.**—In an action on such a policy to recover costs and expenses of defending an action which the insurer failed to defend, where the record on appeal taken by the insurer failed to show whether the complaint disclosed that the complaint in the other action stated a cause of action, the appellate court is bound to assume in support of the judgment that such a showing was made.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Curtis D. Wilbur, Judge.

The facts are stated in the opinion of the court.

Goodrich & Martinson, for Appellant.

James, Smith & McCarthy, for Respondent.

**WORKS, J., pro tem.**—This appeal comes to us under the alternative method. The constant lapses, on the part of the profession, from a proper observance of the rules of practice governing the prosecution of appeals under this method have made it, to us and to the other appellate courts of the state, a dreadful alternative indeed. Once again, at more than a risk of repetition, we call attention to the fact that, under the method, and according to the provisions of section 953c of the Code of Civil Procedure, the parties must print in their briefs "such portions of the record as they desire to call to the attention of the court"; and that "appellate courts will not look to the typewritten transcript filed under the alternative method of appeal for the purpose of determining whether ground exists for the reversal of the judgment appealed from." (*Barker Bros. v. Joos*, 36 Cal. App. 311, [171 Pac. 1085].)

In this case the reproduction of parts of the record in the briefs is so scant that we are enabled to pass upon the questions presented only upon an indulgence in certain assumptions which the law permits us to make. Not enough of the pleadings is printed in the briefs to enlighten us as to the char-



acter of the litigation; and we are not informed, in the manner contemplated by section 953c of the Code of Civil Procedure, of anything concerning the final action of the trial court in the suit, for no part of the findings of fact, conclusions of law, or judgment is reproduced in the briefs. As, however, certain statements concerning these matters are made in the brief of the appellant, as they are not challenged in the respondent's brief, and as the respondent argues the case upon the assumption of their correctness, we will, in turn, assume that they are correct. The action appears, then, to be one in which the plaintiff, which was engaged in the business of advertising and selling automobiles, sued the defendant to recover upon an automobile liability policy. The policy, speaking now in general terms, had been given to insure the plaintiff against loss or expense resulting from claims against plaintiff for damages on account of bodily injuries or death to be suffered by any person through the operation of plaintiff's automobiles. One Hill had brought an action for such damages against the plaintiff but had failed to procure judgment; and the present action was commenced to recover the costs and expenses incurred by the plaintiff in defending against that suit. One paragraph of the complaint in this action and one paragraph of the answer are printed in the appellant's brief, and by them it is shown that the plaintiff alleged and the defendant admitted that the person who was driving a certain car of plaintiff, at the time Hill claimed to have been injured by it, was doing so for his own pleasure, and that he was not then engaged in the business of the plaintiff. The parties concede that the policy was not broad enough to insure against damages recovered in such a case, but the present action, brought to recover the costs and expenses of defending the Hill suit, as already stated, was prosecuted under certain special provisions of the policy, under which the plaintiff claims the right to recover the amount of such costs and expenses, notwithstanding the fact that the defendant could not have been called upon to respond to any claim of plaintiff for damages which might have been recovered by Hill in his action. In this present action the plaintiff had judgment, according to the statements of counsel in the briefs, and the defendant appeals.

The appellant contends that the complaint did not state a cause of action, that neither the findings nor the judgment is

supported by the evidence, and that the findings do not sustain the judgment. In effect, the contention of the appellant principally hinges on the presence in the complaint of the allegation that the person in charge of the respondent's automobile at the time of the alleged injury to Hill was operating it for his own pleasure.

The policy is printed in full in the appellant's brief and it is conceded by counsel that this action was grounded upon two of its paragraphs, which were as follows:

"In addition to the limits hereinafter specified, if any suit is brought against the assured to enforce a claim for damages covered by this policy, the company will defend such suit, whether groundless or not, in the name and on behalf of the assured. The expenses incurred by the company in defending such suit, including costs, if any, taxed against the assured, will be borne by the company, whether the judgment is for or against the assured.

"If any suit, even if groundless, is brought against the assured to recover damages on account of injuries or deaths covered by this policy, the assured shall immediately forward to the company or to the office of its nearest authorized general agent, every summons or other process served, or copy thereof. Thereupon the company will, at its own cost and expense, defend such suit in the name and on behalf of the assured."

The company refused to defend against Hill's complaint, although it was requested to do so, the process which was served in the action having been delivered to it as required by the policy. It will be noted that, in each of the paragraphs quoted above, the suits which the appellant agrees to defend are stated to be those brought to recover damages upon claims "covered by this policy." The appellant contends, in effect, that whether a given claim against the respondent is covered by the policy is to depend, under the paragraphs quoted, upon the outcome of the action brought to enforce such claim; that, if the litigation upon a given demand develops a case in which the claim is not covered by the policy, then and in that event, and for that reason only, the appellant may assert that the action was not one which it was bound to defend; that, in short, whether there be an obligation to defend may be determined after the time for the performance of the obligation has entirely elapsed, instead of before it has commenced to

run. If the position of the appellant were adhered to in all cases, it would work an alteration in the very language of the policy. It would change its terms from those imposing an obligation evidenced by the words "will defend" to terms laying a duty indicated by some such words as "should have defended." Moreover, it would altogether wipe out the obligation to defend, no matter how strong a case were made on the face of a complaint for damages against the assured, for under such a rule the appellant need never defend. Upon an independent investigation of the facts in each case, or without investigation, the appellant could decline to defend, thus imposing upon the assured, in every case, the obligation to defend itself, an obligation which certainly, under the policy, was intended to be discharged by the appellant in some cases. The result would be that the question whether the appellant "will defend," no matter what the form of the complaint in a given case—a question necessarily to be answered at the inception of a litigation—could be answered through the whim, caprice, or judgment of the appellant itself. There is a more certain basis for a determination of the liability of the appellant to defend, and that basis is to be found in the allegations of the complaint in each action for damages against the respondent. We construe the policy to mean that it is the duty of the appellant, under its terms, to defend every action in which the complaint shows "a claim for damages covered by this policy." These views are in accord with those expressed in *South Knoxville Brick Co. v. Empire State Surety Co.*, 126 Tenn. 402, [Ann. Cas. 1913E, 107, 150 S. W. 92, 94], where a policy similar to the one now before us was construed.

We are forced, now, to return to the question of the failure of the parties to observe the provisions of section 953c of the Code of Civil Procedure. It is not shown to us, by the reproduction of any part of the record in the briefs, whether the plaintiff's pleading did or whether it did not show that the complaint in the Hill case stated or attempted to state a cause of action covered by the policy complained of, or whether the evidence showed, under any appropriate issue, what were the allegations of Hill's complaint. The respondent asserts in its brief that the complaint in the Hill case stated such a cause of action, but is silent on the question as to whether the fact was pleaded in the complaint in this action, or as to whether the evidence in this action showed it; but no statement of the re-

spondent could take the place of the reproduction of the record, as required by section 953c, unless it were assented to by the appellant, and the appellant has presented no brief since the respondent's brief was filed. We are bound to assume, however, in support of the judgment now appealed from, such a state of the record of the trial court, the contrary not appearing, as will support the findings. (*Paine v. San Bernardino V. T. Co.*, 143 Cal. 654, [77 Pac. 659].) We will therefore assume, as the state of the pleadings in the Hill case was most material to a determination of this case, as we have already decided, that it appeared to the trial court, either from the pleadings or from satisfactory evidence under them, that the complaint in that action showed against the respondent a claim for damages which was covered by the policy now sued on.

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 12, 1918.

---

[Civ. No. 1566. Third Appellate District.—June 15, 1918.]

LEONARD BOOT, Appellant, v. JUD. W. BOYD,  
Respondent.

**FRAUDULENT CONVEYANCES—SALE OF PERSONAL PROPERTY—CHANGE OF POSSESSION.**—Under section 3440 of the Civil Code, requiring a change of possession on the transfer of personal property, a sale, to be good against the creditors of the vendor, must be accompanied by an actual and continued change of possession, and this means not a mere formal change, but that the possession of the vendee must be open and unequivocal, carrying with it the usual marks and indications of ownership, and it must be such as to give notice to the world of the claims of the new owner, and must be continuous.

**ID.—SALE OF REAL AND PERSONAL PROPERTY—TAKING POSSESSION OF REAL PROPERTY—INSUFFICIENT EVIDENCE OF CHANGE OF POSSESSION OF PERSONAL PROPERTY.**—Where real property is sold and a bill of sale for personal property located thereon is at the same time given to the vendee, the fact that the vendee took possession of the

real property is not sufficient evidence of a change of possession of the personal property.

**ID.—CONTINUATION OF POSSESSION BY SELLER—SUSPICIOUS CIRCUMSTANCE.**—The fact that a buyer of personal property went upon the land where it was located and checked it off, thus exercising an act of ownership, is only a circumstance in determining whether there was a delivery and change of possession, and the continuous possession by the vendor constituted a suspicious circumstance.

**EXECUTION—EXEMPT PROPERTY—DELAY IN MAKING CLAIM—WAIVER.**—Where personal property is levied on under an execution, a delay of the alleged owner to claim exemption after one month's notice of the seizure constitutes a waiver of the claim for exemption.

**APPEAL** from a judgment of the Superior Court of Tehama County. John F. Ellison, Judge.

The facts are stated in the opinion of the court.

George R. Freeman, and Frank Freeman, for Appellant.

P. H. Coffman, for Respondent.

**HART, J.**—Action in claim and delivery, the defendant being the sheriff of Tehama County.

On the ninth day of January, 1915, R. A. Boot and Nora Boot, his wife, in consideration of \$15,642.50, by deed conveyed to plaintiff 170 acres of land in Tehama County, spoken of as the R. A. Boot ranch. On the same day said R. A. and Nora Boot executed to plaintiff a bill of sale conveying certain personal property, consisting of mules, horses, wagons, farming implements, etc., it being stated therein that the consideration named in the above-mentioned deed was also paid for the personal property transferred by the bill of sale.

On the thirteenth day of January, 1915, an action was commenced in the superior court of Tehama County by Jesse A. Brown, as plaintiff, against Robert Boot and James A. Boot, as defendants, to recover \$2,691.83, the amount alleged to be due on certain promissory notes given by the defendants in said action in connection with a contract between the parties for the sale by said Brown to defendants of land adjoining the Boot ranch. A writ of attachment was issued and delivered to the sheriff, who made return that, on January 18, 1915, he levied upon certain personal property and also upon the Boot ranch. The court afterward ordered the attachment

released as to the personal property, and it was returned to the defendants in said action. On July 7, 1915, judgment was entered in favor of plaintiff, Brown, for \$2,691.83; an execution was issued, under which the sheriff levied upon the personal property in question and sold the same for the net sum of \$896.95, which money was delivered to the plaintiff in said action.

The present action was brought to secure judgment for the recovery of the possession of said personal property, or for one thousand eight hundred dollars, the value thereof, and for one thousand dollars damages for the alleged wrongful taking of the same. Judgment was in favor of defendant, from which plaintiff prosecutes this appeal.

Appellant states that "but one thing is involved in the action, namely: The validity of the sale, on January 9, 1915, of the property involved, to plaintiff by said Robert A. Boot and his wife. The trial court decided that the sale was invalid because there was no immediate delivery followed by actual and continued change of possession of the property such as is required by section 3440 of the Civil Code, . . . the alleged sale being void as against the execution creditor."

It appears from the testimony that plaintiff, Leonard Boot, resided in Glenn County. He stated that he received the bill of sale above referred to on the ninth day of January, 1915; that, with R. A. Boot and James Boot, he went to the R. A. Boot ranch, where the personal property was, checked off each item on the bill of sale, looked at every article on the ranch, and took possession of it. The property was assessed to him in the year 1915 and he paid the taxes on it. He stated that he authorized all the work that was done on the personal property and paid those who had anything to do with it. On cross-examination he stated that the personal property in question had been on the R. A. Boot ranch and had belonged to R. A. Boot for about two years; that when he took possession of it he did not take any of it away from the ranch, but put Robert (R. A.) Boot in possession of the property as manager and left it in his control. He said that he knew about the transaction in which Robert and James Boot entered into an agreement, about July, 1913, for the purchase from Jesse A. Brown of what was known as the Brown or Westlake ranch, and knew that said Robert and James were indebted to Brown on account of said purchase. Plaintiff remained over-

night at the Boot ranch, on January 9th, and left there the next afternoon. In a few days he returned, looked over the place, and directed certain work to be done. He testified that thereafter he visited the ranch about once a week; that R. A. Boot conducted the ranch for him, and that he paid said R. A. Boot wages for looking after the property. A few hogs and some fruit raised on the ranch were sold by plaintiff after he received the bill of sale.

Jud. W. Boyd, the defendant, testified that on the 11th of September, 1915, he levied upon and took into his possession the personal property in question; that at that time he found the property in the possession of Robert Boot on the Robert A. Boot ranch and took the property from him; that plaintiff was not there at the time.

Jesse A. Brown testified that in 1914, 1915, and down to September 11, 1915, the personal property was in the possession of Robert Boot; that, when farming Brown's ranch, Robert and James Boot had the property there and about the 1st of January, 1915, they moved it to the Boot ranch. The witness stated that he was "about the Boot ranch a good deal" since the 1st of January, 1915, and that Robert Boot had charge of the property; that he never saw any change of possession of it and never saw Leonard Boot exercise any act of ownership or control over it. On cross-examination the witness said that he had been on the Boot ranch but once since said 1st of January, and that at that time he saw Robert Boot and no one else there; that he had seen him going back and forth and had seen him sitting by the gate one day; that he knew that Leonard Boot claimed the property.

Dan Hamilton testified that, in the summer of 1915, he was employed by Robert Boot to work on the Boot ranch and that he worked there for about three months; that he was there on the 11th of September when the sheriff took the property under the execution; that while witness was on the ranch Robert Boot had charge and control of the personal property; that Leonard Boot was there three or four times but did nothing with the property that witness knew of; that plaintiff worked one day in the dry-yard and he worked picking fruit for the Chinamen a day or two.

Elmer Oakes, who lived across the road from the Boot ranch, testified that, since the 1st of January, 1915, the prop-

erty taken by the sheriff had been in the possession of Robert and James Boot and that he saw no change in the possession of it during that time. Ray Barker testified to the same facts.

In rebuttal, R. A. Boot testified that during the summer of 1915 he was conducting the ranch for Leonard Boot, who paid all the bills incurred.

The single point submitted here for decision involves an attack upon the finding that there was not an immediate and continuous change of possession of the chattels from the owner to the purported vendee, within the meaning and intent of the law. The case as made by the evidence was one peculiarly for the decision of the court, before which it was tried without a jury. In other words, we do not see our way clear to declare, as a matter of law, that there was at any time a change of possession of the chattels involved from R. A. Boot and wife to Leonard Boot. We, therefore, adopt and approve the following portion of the learned trial judge's opinion rendered and filed in deciding the case, and which is incorporated in the brief of respondent.

"The sheriff as a defense sets up his official capacity, and that as such sheriff he took the property under attachment (execution) in a suit wherein one Jesse A. Brown was plaintiff and Robert Boot and James A. Boot were defendants, and at the time he took the same said property belonged to Robert Boot.

"The plaintiff claims that before levy thereon by the sheriff he had bought, for a valuable consideration, all the said property from said Robert Boot, and that it was his property, and not liable to process in the suit of Brown against Boot.

"I have considered the evidence carefully and the authorities cited by the respective parties, and am satisfied that the plaintiff has not shown title good against the process held by the sheriff in said action.

"Section 3440 of the Civil Code provides: 'Every transfer of personal property, other than a thing in action, or a ship or cargo at sea or in a foreign port, and every lien thereon, other than a mortgage, when allowed by law, and a contract of bottomry and *respondentia*, is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore



void, against those who are his creditors while he remains in possession.'

"The supreme court, in considering this section, has held uniformly that a sale of personal property to be good against the creditors of the vendor must be accompanied by an actual and continued change of possession, and that this means not a mere formal change, but that the possession of the vendee must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee, and it must be such as to give notice to the world of the claims of the new owner, and must be continuous.

"From the evidence introduced in this case, about which there is no conflict, it is clear that if any person who had been familiar with the property and its ownership a week before the alleged sale to the plaintiff, had visited the premises a week thereafter, he would have seen or noticed nothing in the management of the property, its possession and location that would have given him any notice that there had been a change of ownership from Mr. Robert Boot to the plaintiff in this action.

"The case seems clear to the court and judgment and findings are ordered for the defendant."

The position of the appellant is that the fact that the land on which the personal property involved herein was kept was conveyed and possession thereof taken by him while the personal property was still on the said land and at the time the bill of sale for the former property was delivered to him amounted to the taking by him, and, therefore, a change of the possession of the personal property. We do not think this was sufficient to evidence that change of possession of personal property which the law requires. Nor do we find that it is so held in any of the many cases cited by the appellant in support of his position.

In *Banning v. Marleau*, 101 Cal. 238, [35 Pac. 772], the gist of the decision as to the question whether there was a change of possession of the chattels therein involved is, generally stating it, that the findings were not specific enough to show upon what theory the case was decided—"that is, whether it was upon the theory that plaintiff was not the owner of the property in any sense, or upon the theory that a sale of said property by Hannon to plaintiff was void as against creditors for want of delivery and an immediate and

continuous change of possession under section 3440 of the Civil Code.”

In *Porter v. Bucher*, 98 Cal. 454, [33 Pac. 335], the plaintiff, who was the wife of one Howard B. Porter, with whom she lived on a farm upon which her husband had duly filed a declaration of homestead, was the owner as her separate property of a hundred or more head of cattle, which were kept on said homestead. The plaintiff bought from her husband a large quantity of hay grown on the homestead for the purpose of feeding it to her cattle. After the hay was cut and stacked in corrals on the premises, the plaintiff and her husband together went to the stacks, “estimated the quantity of hay, agreed upon the price, and the husband, by words, delivered the hay to the appellant (his wife), who thereupon closed and fastened the gates of the corrals, made a payment of ten dollars, and a few days later made another payment of thirty dollars, and, in accordance with the agreement of sale, assumed the payment of certain specified debts of the husband, amounting, with the cash payments, to about eight hundred and seventy dollars, and which debts she afterward paid.” The husband later became an insolvent debtor, having been duly so adjudicated, and thereupon the assignee of the estate of the husband made a demand for and finally seized the hay as being a part of the husband’s assets. At the trial of the action by the wife in claim and delivery for the return of the hay to her possession, the trial court instructed the jury that there was no evidence justifying a finding that there was immediate delivery of the possession of the property followed by an actual and continued change of possession. The supreme court, reversing the judgment entered upon the verdict against the plaintiff, merely held that the evidence was such that the question whether there was the delivery and change of possession required by the law to make the sale valid as against creditors should have been submitted to the jury.

The many other cases cited by appellant are, as we understand them, no more in point in this case than those to which we have above given special attention.

As above stated, we think it is absolutely correct to say here, as is said in *Porter v. Bucher*, *supra*, “that what constitutes an immediate delivery and an actual and continued change of possession is a fact to be determined upon the evidence in each particular case.”

Much stress is, however, laid upon the testimony of the plaintiff that, upon buying the farm and the personal property, he went to the land and checked off the personal property, thus exercising an act of ownership over it. But that was only a circumstance to be considered by the court in determining whether there was a delivery and change of possession. The other fact remains that in point of fact the purported vendor of the property continued in the actual possession of the same. In *Hickey v. Coschina*, 133 Cal. 81, [65 Pac. 313], the plaintiff bought a certain stock of cigars, goods, and fixtures from his son-in-law, one Offield. Some of the goods were shortly after the sale transferred to the rooms of the plaintiff, while a part of them remained for some time thereafter in the rooms of Offield, and finally all removed to a store. Offield remained with the plaintiff as an employee in and about the cigar-store. The goods and fixtures were subsequently attached by the defendant as a constable, in an action to recover a debt due from Offield. The plaintiff prevailed in the court below and the judgment was affirmed on appeal. The court, among other things, said: "It is urged that plaintiff, after the sale, employed Offield, his son-in-law, in and about the cigar-store. *While this was a suspicious circumstance, and one that should have been carefully weighed by the jury, and the court below, yet it was by no means conclusive. It was a circumstance that might be, and was, explained.*"

So in the case at bar. The continued possession of the personal property by R. A. Boot, although the land upon which it was then situated was at the same time transferred to the purported vendee of the chattels, constituted what the court below well might, and no doubt did, consider a "suspicious circumstance," and sufficiently suspicious to lead it to conclude, in considering it in connection with other evidence in the case, that there was not that actual delivery and change of possession of the property requisite to make the sale valid as against creditors.

The judgment is affirmed.

Chipman, P. J., and Burnett, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on July 15, 1918, and the following opinion then rendered thereon:

THE COURT.—For the first time the point is made in the petition for a rehearing of this case that the personal property in dispute herein and which was seized and sold by the sheriff on an execution in satisfaction of the judgment referred to in the original opinion filed herein is exempt from execution by virtue of the provisions of section 3440 of the Civil Code. It is conceded that no claim of exemption was at any time asserted by anyone as to the property, but it is vigorously contended that, under the terms of the section named, a claim of exemption is not required to place exempt personal property within the protection of the law against seizure under legal process for the satisfaction of a judgment against the owner, and in support of this contention the recent case of *Williamson v. Monroe*, 174 Cal. 462, [163 Pac. 662], is cited. In that case, a part of the property levied upon by the sheriff and sold under an execution consisted of the farming utensils, implements of husbandry, and other personal property essential to the prosecution of farming. The property had been sold to the plaintiff, Williamson, by the owner, one Founesbeck, and at the time of said sale it was under attachment issued at the behest of a creditor of the vendor. A part of the consideration of the sale was that Williamson would cause the attachment to be released, and this he did. At no time after the levying upon the property or before the sale thereof under the execution, the purpose of which was to satisfy a judgment secured by one Merkeley against the said Founesbeck and one Holmes, did Williamson make a specific claim that any of the property was exempt from execution under section 3440, *supra*. It was argued in that case that none of the property was exempt from execution "unless a claim to that effect was made, and that, consequently, the proviso [referring to the exemption clause of section 3440 of the Civil Code] does not apply in this case." But the supreme court held adversely to that contention, saying: "The exemption is not declared to be conditional upon the assertion of a claim of exemption by the debtor. Its status as exempt property comes from its character and use, and not from any claim of exemption."

The court, in that case, though, further said: "It is true that the right of exemption may be waived and that, when the officer actually makes a levy upon such property, if the debtor does not claim his right within a reasonable time thereafter,

the delay may be sufficient evidence of such waiver. (*Gavitt v. Doub*, 23 Cal. 78, 80.) But here, when the sale was made on November 14, 1910, the vendee assumed the burden of the attachment lien then existing and immediately discharged it. There was no occasion at that time to claim the exemption, and no person to whom such claim could be made. No other execution or attachment was outstanding. The sale then became complete, there was no waiver of the exemption, the title vested in Williamson, and the exempt property was not afterward subject to execution against Fannesbeck."

In the present case the contention that the property in question is exempt under the terms of the statute necessarily proceeds upon the assumption that said property, when seized by the sheriff, belonged to Robert A. Boot—that is to say, the assumption to support the theory of exemption is that the trial court's judgment that the purported sale to the plaintiff was, as against creditors, fraudulent and void, is sound, for if the sale were a valid one as against creditors, there would be no occasion for the assertion of a claim of exemption by the plaintiff, who was not affected by the judgment to satisfy which the execution was issued and the property thereupon sold. That Robert A. Boot made no claim of exemption at any time is, as above stated, conceded, and we think that he had a reasonable time within which to do so, and that his failure to make the claim within such time amounted to a waiver of the claim. The judgment upon which the execution was issued was given and entered on the seventh day of July, 1915. The execution was taken out on the twenty-eighth day of July, 1915, and on that day delivered to the sheriff. On the eleventh day of September, 1915, the sheriff levied upon and took into his possession from the possession of Robert A. Boot the property in dispute, and on the second day of October, 1915, said sheriff sold the said property as commanded by the said execution. Thus, it will be observed, Robert A. Boot had almost a month's notice of the seizure of the property by the sheriff under the execution, and that much time within which to have asserted the claim that the property was exempt from execution. As before stated, we think that under these circumstances he should be held to have failed to set up his claim of exemption within a reasonable time, and, therefore, waived his right to do so.

But, as stated at the beginning of this opinion, the proposition that the personal property involved herein is exempt from execution has been raised for the first time in the petition for a rehearing of this case. No such issue was presented by the pleadings, no such claim made at the trial, and no claim or point involving that proposition is presented or discussed in the original briefs filed herein by counsel for the appellant. In fact, counsel for the appellant themselves in their opening brief state the question which was submitted to and tried and decided by the trial court and submitted here as follows: "The action is an ordinary action in claim and delivery, and but one thing is involved in it, namely: The validity of a sale, on January 9, 1915, of the property involved to plaintiff by said Robert A. Boot and his wife." And the discussion in the briefs, both in the opening and closing by appellant, is confined entirely to the proposition as thus stated. There is, as in effect before declared, not the slightest intimation either in the record or the briefs that the question of the right to claim exemption of the property from execution was or would be relied upon.

It has long been the rule in this state that the appellate courts will not review or consider points which have not been made in the court below. In the very early case of *Morgun v. Hugg*, 5 Cal. 409, it was held: "Errors cannot be relied upon in an appellate court which are not taken advantage of and raised at the trial." This rule, which is a most salutary one, has been uniformly adhered to by the reviewing courts of this state down to the present day. (See, also, *McDonald v. Bear River & A. W. & M. Co.*, 13 Cal. 220; *King v. Meyer*, 35 Cal. 646; *Stoddard v. Treadwell*, 29 Cal. 281; *Williams v. McDonald*, 58 Cal. 527; *Anderson v. Black*, 70 Cal. 231, [11 Pac. 700]; *Adams v. Crawford*, 116 Cal. 495, [48 Pac. 488]; *Sprigg v. Barber*, 122 Cal. 573, [55 Pac. 419].)

We are satisfied with the conclusion announced in our former opinion upon the other branch of the discussion.

The petition for a rehearing is denied.

[Civ. No. 1493. Third Appellate District.—June 17, 1918.]

GEORGE R. B. MYERS, Respondent, v. D. CANEPA et ux.,  
Appellants.

**APPEAL—JUDGMENT-ROLL—PRESUMPTION.**—On an appeal on the judgment-roll alone, every intendment possible is in favor of the judgment or order appealed from, and if error does not affirmatively appear, the judgment or order will be sustained, if there is any possible ground.

**ID.—IMPROPER JOINDER OF CAUSES OF ACTION—TRIAL UPON COMPLAINT—WAIVER OF DEFECT—PRESUMPTION.**—On an appeal taken for failure to sustain a demurrer to a complaint which improperly united causes of action, but in itself stated a good cause of action in so far as the plaintiff himself was concerned, a judgment in favor of plaintiff will be affirmed, since it will be presumed that the defect was cured at the trial.

**ID.—ACTION FOR MEDICAL SERVICES—SINGLE CAUSE OF ACTION.**—A complaint in an action by a physician for services, which include the claims of two other physicians for services performed with the defendant's consent, states but a single cause of action in favor of the plaintiff, where it is alleged that the charges of the latter were made against the plaintiff personally and formed part of his account.

**APPEAL** from a judgment of the Superior Court of Napa County. Henry C. Gesford, Judge.

The facts are stated in the opinion of the court.

Devoto, Richardson & Devoto, and Percy S. King, for Appellants.

Clarence N. Riggins, W. W. Kaufman, and Wm. P. Hubbard, for Respondent.

**CHIPMAN, P. J.**—The cause is before us on rehearing. The following statement of the case is taken from the original opinion, written by Justice Hart, affirming the judgment:

"The action was brought to recover judgment against the defendants for medical services rendered and for goods, wares, and merchandise furnished to them. After a jury trial and verdict, judgment was entered in favor of plaintiff

for the sum of three hundred dollars, from which defendants prosecute this appeal on the judgment-roll alone.

"The fourth amended complaint is in two counts. In the first count it is alleged: 'That on the nineteenth day of December, 1914, said defendants were indebted to the plaintiff in the sum of \$477.50 on account for medical and surgical services rendered to and for said defendants at their special instance and request by the plaintiff, and by Dr. Laurence Welti and Dr. C. H. Bulson, who performed services for plaintiff therein, for and with the consent of the defendants. By way of explanation of the foregoing allegation and to make the complaint more certain, plaintiff further alleges that during the time in which plaintiff was rendering the services sued for herein, and with defendants' knowledge and consent, and upon defendants' request, the plaintiff called in said Dr. Laurence Welti and Dr. C. H. Bulson, for consultation and advice therein, and for assistance in the performance of said surgical services, and that the charges of said Dr. Laurence Welti and Dr. C. H. Bulson therefor were made against the plaintiff personally, and not against the defendants, or either of them, and are included by plaintiff in his account, and form part of said account against said defendants, and that of the \$477.50 sued for herein as above alleged one hundred dollars is on account of the services so rendered by Dr. Laurence Welti, and \$2.50 is on account of the services so rendered by Dr. C. H. Bulson, and \$375 is on account of the services rendered by plaintiff personally.'

"In the second count it is alleged that, on December 19, 1914, defendants were indebted to D. H. Williams in the sum of \$23.05 on account of goods, wares, and merchandise (stated in the briefs to have been medicines) sold and delivered to defendants at their special instance and request, and that said Williams has assigned said claim to plaintiff.

"Defendants demurred to said fourth amended complaint, and also moved for an order striking it from the files. The demurrer was overruled, and the motion denied, and the action of the court in these respects is assigned as error.

"Respondent has filed a notice of suggestion of diminution of the record, setting forth the minute order made on October 18, 1915, at which time a motion for a new trial was denied, said minute order reading as follows:



“ ‘The above motion for new trial came on regularly. . . . Motion argued and submitted, and the court orders that the motion for a new trial is granted unless the plaintiff produce within ten days satisfactory vouchers of the payment and release of demands of Drs. Laurence Welti and C. H. Bulson, and if such vouchers are produced to the satisfaction of the Court, then, and in that event, the motion for new trial will stand denied.

“ ‘Said release having been produced and approved by the court and filed, the motion for a new trial is hereby denied.’

“ ‘A copy of the release signed by said Drs. Welti and Bulson is also contained in said notice of suggestion of diminution of the record.

“ ‘The application to have incorporated in the record, upon a suggestion of a diminution of the record, the minutes of the court on the motion for a new trial should be and is denied for the reason that said proceedings are not authenticated by incorporating the same in a bill of exceptions. (Code Civ. Proc., sec. 950; Rule 29, Supreme Court.) Moreover, the appeal here is from the judgment on the judgment-roll alone, and the motion for a new trial and an order denying the motion are no part of the judgment-roll. (Code Civ. Proc., secs. 670 and 963, the amendment of the latter section by the legislature of 1915—see Stats. 1915, p. 209—so as to destroy the right of appeal from an order *denying* a new trial, having gone into effect before the appeal here was taken.)’ ”

In the petition for rehearing much stress is laid upon the erroneously assumed fact that in upholding the judgment “this court, in its opinion, considers matters entirely outside of the record.” Appellants wholly misconceive the grounds on which the decision is rested. While error was declared in overruling the demurrer, the decision was placed entirely upon well-settled rules of procedure where presumptions and intendments come into play in support of the judgment on appeals on the judgment-roll alone. It is with these presumptions and intendments in support of the judgment we are alone concerned, for appellants insist that no presumptions or intendments can deprive them of a right to a reversal of the judgment for the obvious imperfections of the complaint pointed out in their demurrer.

Referring to the demurrer interposed to the complaint: It may be conceded that the effect of the averments of the fourth

amended complaint is improperly to unite a cause of action in favor of plaintiff personally with a cause of action in favor of Dr. Laurence Welti and Dr. C. H. Bulson. Neither of the two latter was a party to the action, and neither of them assigned his claim to plaintiff. It is alleged that their "services were rendered to and for defendants at their special instance and request," and this averment is in no wise qualified by the further averment that they "performed services for plaintiff therein." Notwithstanding this improperly uniting of the claims of Drs. Welti and Bulson with that of plaintiff for his personal services, there remained sufficient after disregarding the averments as to Drs. Welti and Bulson, to constitute a cause of action in favor of plaintiff, and the general demurrer was properly overruled. The demurrer "that several causes of action have been improperly united" should have been sustained. So, also, the demurrer "that several causes of action are not separately stated, namely, a cause of action in favor of plaintiff against said defendants is not separately stated from causes of action in favor of Dr. Laurence Welti and Dr. C. H. Bulson against said defendants," should have been sustained.

There was also a special demurrer interposed, for uncertainty, ambiguity, and unintelligibility on nine different grounds, some of which, if not all, would have justified the court in sustaining the demurrer. Despite its imperfections, however, there was enough in the complaint to confer jurisdiction of the parties and the subject matter. Defendants answered denying specifically the averments of the complaint, and by way of cross-complaint set out what is intended as a cause of action for damages resulting from alleged improper and unskillful treatment of the patient for whom plaintiff was called to prescribe.

The parties went to trial, the result of which was a general verdict by a jury in favor of plaintiff for three hundred dollars, which was \$98.05 less than the amount of plaintiff's individual claim. Upon what theory the case was tried; to what issues the evidence was addressed; whether the jury allowed anything for the services of Drs. Welti and Bulson, or either of them, or allowed anything on the assigned claims; or based their verdict wholly on the claim of plaintiff, which was for \$375, we do not know. The record is silent. The case is here on the judgment-roll. In such case, certain presumptions and intendments are indulged and come to the relief of

the prevailing party, who might otherwise find himself much embarrassed by his failure to observe the rules governing good pleading in bringing his action.

The position taken by appellants is thus stated in their petition for rehearing: "It was not obligatory upon us in an appeal from the judgment upon the judgment-roll alone, to incorporate in the record evidence which was taken at the trial. (Code Civ. Proc., sec. 670, and Code Civ. Proc., sec. 950.) Having presented the papers necessary upon this appeal, the question is simply one of law; whether the fourth amended complaint was a proper pleading in the face of the demurrer filed by the defendants, and whether or not the order of the court overruling said demurrer affected the substantial rights of the defendants."

The general rule, affirmed in a multitude of cases, is this: "On appeal all intendments are in favor of the regularity of the action of the court. Error will never be presumed, and the burden is upon the appellant to show that it exists." (2 Hayne on New Trial, p. 1576.) In an appeal on the judgment-roll alone every intendment possible is in favor of the judgment or order appealed from, and if error does not affirmatively appear, it will be sustained, if there is any possible ground on which it can be sustained. (Id.) But, say appellants: The error here is patent and conceded, i. e., the complaint on its face is amenable to the demurrer, and the order overruling it was therefore error which the rule of presumptions and intendments cannot cure or overcome. In short, whatever may be the scope of the rule, admittedly very sweeping, it does not reach an error committed in passing upon the sufficiency of a complaint when the question is raised by demurrer.

Whatever may have been the interpretation put upon section 475 of the Code of Civil Procedure prior to the adoption of section 4½, article VI, of the constitution, it is settled that injury is no longer presumed from error, but must be affirmatively shown. (*Vallejo etc. R. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, [147 Pac. 238].) The provision is: "No judgment shall be set aside . . . for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

How can the court determine that defendants were injured by overruling the demurrer in this case in the absence of the record showing what occurred at the trial? It may have been that appellants consented to the trial upon its merits without objection to the evidence in support of the complaint, notwithstanding its defects. There may be presumptive waiver, which is a species of consent. As was said by Judge Hart in the original opinion: "In considering an appeal supported by the judgment-roll only, all presumptions and intendments are to be indulged favorably to and in support of the judgment. It must, in other words, be presumed that there was evidence sufficient to support the findings or the verdict, and that, whatever might have properly occurred at the trial to cure the defects of the complaint in any vital particular, did actually occur." As to alleged uncertainty in a complaint challenged by a demurrer, the court said, in *Rooney v. Gray Bros.*, 145 Cal. 753, 758, [79 Pac. 523, 524]: "When a case has been tried and a judgment rendered on the facts, in order to warrant a reversal upon the ground of error in overruling a demurrer interposed on the ground of uncertainty in the complaint, it must appear that some substantial right of the demurrant has been affected, some prejudicial error, as distinguished from abstract error, suffered by him, or he has no room for complaint." (See *Dennis v. Crocker-Huffman etc. Co.*, 6 Cal. App. 58, 61, [91 Pac. 425].)

The answer, as we have seen, put in issue every averment of the complaint. The complaint was sufficient as against a general demurrer. It was entirely proper for the parties to try the case on its merits, if they chose to do so, even though the complaint was ambiguous and uncertain, and there were several causes of action improperly united. In support of the judgment we must presume that the case was tried on its merits regardless of the imperfection of the complaint, which must be deemed to have been waived.

Bearing in mind that the issues were tried on complaint and answer, we think the following statement by Judge Hayne, in his New Trial, page 1576, is true in the present case: "If the judgment-roll does not itself disclose the error complained of, it is incumbent upon the appellant to make a showing *dehors* such judgment-roll. This can be done in no other way than by bill of exceptions. or, in case of a new trial order, a statement. This is the record of which it is said error must

be affirmatively shown therein, and it must contain everything necessary to make the error apparent; for if anything should be wanting the omission would be fatal. The rule of presumption supplies what is necessary to the validity and the correctness of the action of the trial court, but supplies nothing indicative of error."

The judgment is affirmed.

Hart, J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 15, 1918, and the following opinion then rendered thereon:

**THE COURT.**—In denying the application for a hearing in this court after decision by the district court of appeal of the third appellate district, we deem it proper to say that, in our opinion, the allegation in the first count of the fourth amended complaint, as set forth in the opinion, substantially states only a single cause of action in favor of plaintiff alone.

The application for a hearing in this court is denied.

---

[Civ. No. 2278. First Appellate District.—June 17, 1918.]

**PIERRE ZUCCO et ux., Respondents, v. TOMMASO FARULLO, Appellant.**

**APPEAL — DEFAULT JUDGMENT — MISJOINDER OF CAUSES OF ACTION.**—

Upon an appeal upon the judgment-roll from a default judgment, the appellate court will not consider the question of misjoinder of causes of action in the manner it would if a demurrer had been filed in the case upon that ground.

**Id.**—**SUFFICIENCY OF PLEADING.**—If a complaint states a cause of action sufficient as against a general demurrer to sustain the relief actually given in the judgment, it will not be held invalid because it also states facts authorizing other relief.

**UNLAWFUL DETAINER — DEFAULT JUDGMENT — MISJOINDER OF OTHER CAUSES OF ACTION—INSUFFICIENT GROUND FOR REVERSAL OF JUDGMENT.**—Upon an appeal from a default judgment in an action in unlawful detainer, the court will not reverse the judgment because of an attempt to unite other causes of action with that of unlawful

detainer, where the complaint states a cause of action in unlawful detainer.

- ID.—REFORMATION OF LEASE—DEFAULT JUDGMENT BASED UPON THREE-DAY SUMMONS NOT VOID.**—A default judgment in an action in unlawful detainer predicated on a three-day summons is not void because a reformation of the lease was also asked in the complaint, since the court had the right to construe the lease to determine its true meaning, reformation being immaterial.
- ID.—EFFECT OF DEFAULT JUDGMENT.**—A default judgment in an action in unlawful detainer, entered without findings, must be taken to have established all the facts aptly pleaded in the complaint.
- ID.—NOTICE TO QUIT—PERFORMANCE OF COVENANTS.**—A notice to quit for nonperformance of covenants in a lease need not demand a performance of a covenant to take care of trees, cultivate the ground, or furnish the landlord vegetables, since such covenants could not afterward be performed.
- ID.—COMMISSION OF WASTE—DEMAND OF PERFORMANCE.**—Where a tenant has committed waste, a notice to quit need not demand performance of the covenants against committing waste, in view of section 1161, subdivision 4, of the Code of Civil Procedure.
- ID.—REASON FOR TERMINATING LEASE.**—A notice to quit for failure to perform covenants in a lease need not state the reason for terminating the lease.
- ID.—PLEADING.**—In an action in unlawful detainer, the complaint need not set out in full the notice to quit, it being sufficient to allege its legal effect.
- ID.—SERVICE OF NOTICE.**—In an action in unlawful detainer, plaintiff need only allege that he served notice in writing, on defendant, or that notice in writing was served.

**APPEAL** from a judgment of the Superior Court of Contra Costa County. R. H. Latimer, Judge.

The facts are stated in the opinion of the court.

J. E. White, and R. N. Wolfe, for Appellant.

Titus, Creed, Jones & Dall, and W. K. Powell, for Respondents.

**BEASLY, J., pro tem.**—This is an action primarily of unlawful detainer, in which the defendant defaulted, and judgment was thereupon taken against him for the possession of the premises demanded and for damages, and for some other relief hereinafter noticed. He appeals from this judgment,

and makes three points for reversal, namely, that three causes of action are improperly united in the complaint, to wit, first, a suit in equity for the reformation of a lease; second, an action at law for damages for breach of the covenants of the lease, and, third, an action of unlawful detainer.

This court, upon an appeal upon the judgment-roll from a default judgment, will not consider the question of misjoinder of causes of action in the manner it would if a demurrer had been filed in the case upon that ground. If a complaint states a cause of action sufficient as against a general demurrer to sustain the relief actually given in the judgment, it will not be held invalid because it also states facts authorizing other relief. This follows from the rule laid down in *Alexander v. McDow*, 108 Cal. 25, [41 Pac. 24], and *Amestoy v. Electric Rapid Transit Co.*, 95 Cal. 311, [30 Pac. 550]. The complaint herein is not obnoxious to a general demurrer. It states a cause of action for unlawful detainer. It also attempts to state facts upon which it is claimed other relief might have been given; but, under the authority of those cases, this court will not, on appeal from a default judgment, where the complaint states a cause of action, as it does here, reverse the judgment because of an attempt to unite other causes of action with that of unlawful detainer.

There are other and more serious questions which arise upon this complaint, and the summons and service thereof, on which this default judgment is predicated.

The summons was the usual three-day summons provided in summary proceedings for the recovery of the possession of real property by section 1167 of the Code of Civil Procedure. It was served on May 14, 1907, the day the action was begun. Default of the defendant for failure to appear was entered four days later, namely, on May 18th. Other relief than possession of the property and damages for the unlawful detainer was prayed for in the complaint and granted by the judgment, and it is contended on behalf of appellant that for this reason the three-day summons was not proper, but that the usual ten-day summons should have been issued in the case, and that ten days after service thereof should have been allowed the defendant in which to appear. The other relief consisted in reformation of the lease by substituting the word "second" for the word "first" in reference to the party whose duty it was to water certain trees planted on the premises and to take

care of them. The party of the first part was the landlord; the party of the second part the tenant. The lease, recited literally in the complaint, contained among others this provision: "The party of the second part is to plant trees over ten acres of the tract, and the party of the first part is to furnish the trees therefor. The party of the *first* part agrees to water all the trees planted on said premises and to take the best care of them. *He* shall cultivate the space between the trees and all other ground where no trees have been planted." The lease gave the tenant (the defendant) exclusive possession of the entire property except a residence, which the landlord (plaintiff) reserved for her own use. The entire care of the property devolved upon the defendant. He was to care for and keep in repair the pumping plant on the premises. As has been said, the particular in which the court undertook to reform this lease was to substitute "party of the second part" for "party of the first part" in the above-recited clause thereof as to watering and caring for the trees. Respondent claims in that behalf that under the rule of *Gray v. Maier & Zobelein Brewery*, 2 Cal. App. 653, [84 Pac. 280], where there is an obvious inadvertence in naming the party charged with a duty in the lease, and where the defect is so glaring in itself as to suggest the mutual character of the error, the court will in an action of unlawful detainer ascertain and enforce the real intention of the parties without resort to a separate suit in equity to reform the lease. What the court did in that case was to find that the words "first party" used in the lease in connection with an option were inadvertently used where the words "second party" were intended, and adjudged that the lease be corrected accordingly. While that action was one of unlawful detainer the parties had appeared, and we doubt if the case is authority for holding that the equitable remedy of reforming a lease can be administered upon default under a three-day summons. But however that may be, we do not think it necessary to decide whether such is the rule of *Gray v. Maier & Zobelein Brewery*, *supra*, nor whether such rule should be applied here; for the trial court, having the right to construe the lease and, holding it by its four corners, to determine its true meaning, and it being unreasonable to put any other construction upon it than that the intention of the parties was that the tenant should water the trees and take care of them, it became unnecessary



to reform the lease. The whole question was one of construing the lease and determining its meaning, and that, too, where the meaning was clear, for the landlord was a woman, and in the sentence immediately following, if this paper is to be construed with technical exactness, the pronoun "he"—evidently referring to the party who was to water the trees—can refer to only one person, and that the tenant, who was a man. The lease, it must be admitted, was open to this construction, and really it is impossible to say that any other construction could be placed upon it. The judgment, therefore attempting to reform the lease, was immaterial.

It is alleged in the complaint that the defendant neglected and failed to perform various conditions and covenants of his lease, in that he failed and neglected during the calendar year 1916, and prior to the fifth day of May, 1917, to water all of the trees planted on said premises, or take the best care of them, and that he did not cultivate the space between the trees and all other ground where no trees had been planted, and that he did not furnish to the plaintiff vegetables and produce from said premises sufficient for the complete family use of the said plaintiff or to her satisfaction, and that he did not furnish all of the labor required to build a house, as agreed in said lease, and that he failed, and still fails, to furnish certain materials needed in the construction of said house, and that he had not kept in repair or good shape the pump, engine, or fences on the premises; that he had not constructed roads and paths required to be constructed by his lease; that he had not kept stock at the required distance from the house on said premises retained by said plaintiff, and that he has not properly cultivated or cared for said premises, and that he has committed waste on said premises—all of which things he was required to do and perform by the terms of the lease itself.

The default judgment, entered without findings, must be taken to have established all the facts aptly pleaded in the complaint, including a finding of the truth of the foregoing allegations. It is provided in subdivision 3 of section 1161 of the Code of Civil Procedure that a tenant of real property for a term less than life is guilty of unlawful detainer when he continues in possession, in person or by subtenant, after neglect to perform other conditions or covenants of the lease or agreement under which the property is held than the one for the payment of rent, and three days' notice in writing re-

quiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him, and, if there is a subtenant in actual possession of the premises, also upon the subtenant. Within three days after the services of the notice the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform the covenants or conditions of the lease, or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture; *provided*, that if the conditions and covenants of the lease violated by the lessee cannot afterward be performed, then no notice as last prescribed herein need be given to said lessee or his subtenant, demanding the performance of the violated conditions or covenants of the lease.

Under this proviso, if the defendant had violated conditions of his lease which could not afterward be performed, it was not necessary to include in the notice a demand for performance of such violated conditions or covenants. It is manifest that Farullo had violated conditions of his lease which could not afterward be performed, among others that of watering the trees, of taking care of them, the covenant to cultivate the space between the trees and the ground where no trees had been planted, and to furnish Mrs. Zucco with vegetables and produce sufficient for her family use during the calendar year prior to the fifth day of May, 1907; and, perhaps, some of the other violated terms of the lease set forth in the above-quoted allegations of the complaint. These things could not afterward be performed. Therefore, a demand for the performance of these violated conditions, at least, was not necessary to the validity of the notice to quit. It is alleged in the complaint that Mrs. Zucco caused to be personally served on Farullo a notice in writing, wherein she canceled the lease, and demanded that within three days he vacate the premises and surrender the possession thereof. This, in the view we take of the matter, considering the character of the violations of the conditions of the lease, was all that was required in the way of notice. The violation of these conditions of the lease terminated it. Especially is this true of the violation of the condition against waste. It is provided in subdivision 4 of section 1161 of the Code of Civil Procedure, that any tenant committing waste upon the demised premises contrary to the conditions and covenants of his lease thereby terminates the

lease, and the landlord or his successor in estate shall, upon service of three days' notice to quit upon the person or persons in possession, be entitled to restitution of possession of such premises under the conditions of this chapter. No alternative notice was, therefore, necessary. The notice to quit was all that was required. A notice to quit, such as is sufficient in this case, differs from a notice to perform or quit. Where the violation is of conditions which upon notice the tenant might perform within the three days, notice to so perform must be given; but where, as here, the breach of the lease is of such a nature that the condition violated cannot be performed no notice is required. (*Schnittger v. Rose*, 139 Cal. 656, [73 Pac. 449].) So, also, no useful purpose could be served by stating in the notice that Farullo's lease was canceled for failure to perform a specified condition of the lease, and for this reason, no doubt, the statute does not require that the reason for terminating the lease be stated in cases of this nature.

The allegations of the contents of the notice also are sufficient. It was not necessary to set out in full the notice served. The notice was alleged in accordance with its legal effect, and in the respect that it may be alleged either literally or according to its legal effect a notice to quit does not differ from other instruments.

So, also, the service was sufficiently alleged, for it is said in *Cowdell v. Linforth*, 10 Cal. App. 3, [100 Pac. 1071], that "it was only necessary for the plaintiff to allege that she served notice in writing upon the defendant, or that notice in writing was served upon the defendant, and prove that she served it or had it served. The statute (Code Civ. Proc., sec. 1162) provides different methods of serving notice, and the plaintiff was only required to allege the ultimate fact, to wit, that she had it served."

It is also claimed that the amount of damages given was too large. The trial court is presumed to have taken the evidence upon this point, and as the allegations of the complaint as to damages are presumed to have been supported by the evidence in the absence of findings, we cannot interfere with the trial court's decision upon that matter.

The judgment is affirmed.

Kerrigan, J., and Zook, J., *pro tem.*, concurred.

[Civ. No. 2265. Second Appellate District.—June 17, 1918.]

**MAX L. HUBERMANN, Appellant, v. NATIONAL SURETY COMPANY (a Corporation), Respondent.**

**ACTION ON BOND OF BUILDING CONTRACTOR—FINDING OF NONPERFORMANCE OF CONTRACT IN FORECLOSURE ACTION — PARTIES NOT CONCLUDED.**—In an action by the owner against the surety on a building contractor's bond, the finding of nonperformance of the contract in a lien foreclosure action, wherein the owner and surety were made parties defendant, is not conclusive as between them, where neither prayed for nor was granted any relief against the other.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Curtis D. Wilbur, Judge.

The facts are stated in the opinion of the court.

**E. W. Forgy, for Appellant.**

**Bennett, Turnbull & Thompson, for Respondent.**

**WORKS, J., pro tem.**—This is an action to recover on two bonds, given concurrently with a contract for the construction of a building for the appellant. One of the bonds was executed pursuant to the provisions of section 1183 of the Code of Civil Procedure, relating to mechanics' liens, and the other was a common-law bond, given to secure a faithful performance of the building contract. There had been prosecuted to final judgment, before the trial of the present action, certain consolidated actions for the foreclosure of mechanics' liens on the building agreed to be constructed under the contract. Both the appellant and the respondent were parties defendant in those actions and neither prayed for or was granted any relief against the other. In those cases the trial court found that there was not a substantial performance of the building contract. The appellant, at the trial of the present action, offered in evidence the judgment-roll in the mechanic's lien cases, but the evidence was excluded. The trial court found that an allegation of the complaint to the effect that the building contract had

not been performed was not true, and rendered judgment for the defendant, and the plaintiff appeals.

The appellant contends that the court ruled erroneously in excluding the judgment-roll in the lien cases and asserts that the finding of nonperformance in those actions is conclusive upon the parties in this. The respondent takes the attitude that the judgment in the lien cases is not *res adjudicata* as between the present parties, for the reason that they were aligned together as defendants in that litigation. The position of the respondent is correct. (Code Civ. Proc., secs. 1908, 1910; *Robson v. Superior Court*, 171 Cal. 588, 593, [154 Pac. 8].)

The appellant also contends that there is no evidence to support the finding of the trial court that the allegation of the complaint that there was no performance of the building contract was not true. Certain testimony which is quoted by the appellant in his brief is to the effect that there were certain departures from the strict terms of the contract in the performance of the work under it; but the trial court, having before it the evidence as to the cost and character of the building—as we must assume it did, there being no showing in the briefs to the contrary (*Paine v. San Bernardino V. T. Co.*, 143 Cal. 654, [77 Pac. 659])—might very well have held that these departures were trivial and that they did not affect the question of substantial performance of the contract. The burden was upon the appellant to show that the contract was not performed, and we cannot say, from the very meager reproduction of the evidence in the briefs, that the burden was sustained.

This appeal comes to us under the alternative method. It is provided by section 953c of the Code of Civil Procedure that, in presenting appeals under that method, the parties shall print in their briefs “such portions of the record as they desire to call to the attention of the court.” We have been in much doubt whether the appellant has presented to us, under the terms of that section, enough of the record of the trial court to enable us to consider the point first discussed in this opinion (*Barker Bros. v. Joos*, 36 Cal. App. 311, [171 Pac. 1085]), and whether we ought not to affirm the judgment on that ground. As, however, the question is a close one and as an affirmance results in any event, we have determined to concede, as a basis for the discussion of the point first

considered in the opinion, that the compliance with the terms of section 953c is sufficient.

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

---

[Crim. No. 612. Second Appellate District.—June 17, 1918.]

In the Matter of the Application of SEYMOUR J. THURBER for a Writ of Habeas Corpus.

**EXTRADITION—DUTY OF GOVERNOR.**—Where a person is properly charged with the commission of a crime under the laws of another state while within its jurisdiction, after which he departs from such state and is found within this state, it is the duty of the Governor, upon the presentation of proper documents, to honor the requisition made by the Governor of such state, and neither the executive nor the courts of this state have the right to inquire into the question of his guilt or innocence.

**ID.—FUGITIVE FROM JUSTICE.**—The expression “fugitive from justice,” as used in the Revised Statutes, section 5278, regulating the extradition of fugitives from justice, has reference to a person who, having within the state committed that which by its law constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, has left its jurisdiction and is found in the territory of another state.

**ID.—HABEAS CORPUS—SCOPE OF INQUIRY.**—On *habeas corpus* by one arrested on an extradition warrant, inquiry may only be made into the question of fact as to whether the accused was within the territory of the other state when the alleged offense was committed.

**APPLICATION** for a Writ of Habeas Corpus originally made to the District Court of Appeal for the Second Appellate District.

The facts are stated in the opinion of the court.

Wm. M. Morse, Jr., and S. M. Johnstone, for Petitioner.

Thomas Lee Woolwine, District Attorney, and J. W. Joos, Deputy District Attorney, for Respondent.

SHAW, J.—Petitioner, who is in custody under a warrant issued by the chief executive of this state on a requisition made by the Governor of Illinois, seeks his discharge therefrom upon the grounds: First, that he is not a fugitive from justice; and, second, alleged insufficiency of the information which charges him with the crime of abandoning his wife and minor child, who were in destitute circumstances, without providing them with means of support.

In our opinion, there is no merit in either point. The first contention is supported by affidavits which, in effect, tend to show that, prior to his leaving the state of Illinois, petitioner had made provision for the support of his wife and child, from which facts, if true, petitioner argues that he is innocent of the offense charged against him, and, therefore, could not be a fugitive from the justice of the demanding state. The expression "fugitive from justice," as used in the Revised Statutes, section 5278, [3 Fed. Stats. Ann., 2d ed. p. 285; U. S. Comp. Stats. 1916, sec. 10,126], regulating the extradition of fugitives from justice, has reference to a person, who, having within the state committed that which by its law constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, has left its jurisdiction and is found in the territory of another state. (*Roberts v. Reilly*, 116 U. S. 80, [29 L. Ed. 544, 6 Sup. Ct. Rep. 291]; *Bailey on Habeas Corpus*, sec. 129.) The authorities go no further than to hold that inquiry may be made into the question of fact as to whether the accused was within the territory of the state when he is alleged to have committed the offense charged against him. If it be made to appear that he was not, then he could not have fled therefrom and could not be a fugitive from justice. (*Ex parte Reggel*, 114 U. S. 642, [29 L. Ed. 250, 5 Sup. Ct. Rep. 1148]; *Bruce v. Rayner*, 124 Fed. 481, [62 C. C. A. 501].) Petitioner, however, concedes that he was in the state of Illinois at the date when the alleged offense was committed; hence such question of fact is not involved. He may, as claimed by counsel and as shown by the affidavits, be innocent of the offense charged against him, but neither the Governor upon whom demand is made for his requisition nor the courts of this state can inquire into the question of his guilt or innocence. (*Kingsbury's Case*, 106 Mass. 223.) Since no question is raised as to petitioner having been in

the state at the time of the alleged commission of the offense with which he is charged, there can be no doubt as to his being a fugitive from justice when found in this state.

As to the second point, petitioner does not attack the information upon the ground that it fails to allege the commission of an offense, but seeks by his affidavits to show that on the date when the offense is alleged to have been committed, as well as thereafter, he made provision for the support of his wife and child, with whose knowledge and consent he left Illinois. As above stated, the courts of this state are not empowered to inquire into the truth or falsity of the alleged facts constituting the offense. As shown by the record before us, petitioner is properly charged with the commission of a crime under the laws of the state of Illinois while within its jurisdiction, after which he departed from said state, and having been found in this state, it was the duty of the Governor thereof, upon the documents presented, to honor the requisition made by the Governor of Illinois and issue the warrant under which he is held in the custody of Martin McCormick, an agent of the demanding state, for return thereto to answer the charge.

It is, therefore, ordered that petitioner be remanded to custody.

Conrey, P. J., and James, J., concurred.

---

[Civ. No. 2215. First Appellate District.—June 18, 1918.]

**SPAULDING & COMPANY (a Corporation), Appellant, v. KATHERINE CHAPIN, Defendant; W. W. CHAPIN, Respondent.**

**JUDGMENT—MOTION TO VACATE—TIME.**—A judgment rendered on a demurrable complaint, but within the relief demanded, is erroneous, but not void, and cannot be set aside on motion made under section 473 of the Code of Civil Procedure after the time for appeal and the time for making such motion has expired.

**ID.—SERVICE OF NOTICE OF OVERRULING DEMURRER — ERRONEOUS AFFIDAVIT—JUDGMENT NOT VOID ON FACE.**—A judgment is not void on its face and subject to be set aside on motion after the time allowed



by section 473 of the Code of Civil Procedure, because the affidavit of service of notice of overruling of the demurrer to the complaint erroneously showed service to have been made on attorneys not representing the defendant, where the service in fact was made on proper counsel.

**ID.—JUDGMENT—WHEN VOID ON FACE.**—A judgment is void on its face when that matter is made apparent by an inspection of the judgment-roll.

**ID.—DEFECTIVE AFFIDAVIT OF SERVICE—JUDGMENT NOT VOID ON FACE.**—Inasmuch as proof of service of notice of decision on demurrer does not constitute part of the judgment-roll within section 670 of the Code of Civil Procedure, the fact that the affidavit of service is defective does not make a judgment thereon void on its face.

**ID.—DEFECTIVE NOTICE—ESTOPPEL.**—A defendant who has obtained numerous extensions of time after service of notice of overruling demurrer within which to answer is estopped from asserting that the notice was defective.

**APPEAL** from an order of the Superior Court of the City and County of San Francisco setting aside a judgment.  
E. P. Shortall, Judge.

The facts are stated in the opinion of the court.

Willard P. Smith, and B. B. Blake, for Appellant.

Bert Schlesinger, for Respondent.

**KERRIGAN, J.**—This is an appeal from an order setting aside a judgment made after the time for appeal had elapsed and after the time when a motion to vacate the judgment might have been made under the provisions of section 473 of the Code of Civil Procedure. This court heretofore, on January 24, 1918, rendered its judgment on the appeal and reversed the order, but thereafter granted the petition of W. W. Chapin, the respondent, for a rehearing, and has heard further argument upon some of the questions involved.

In view of the fact that the judgment here attacked could properly have been set aside only in the event that it was void on its face, but two of the points discussed in the briefs and upon the arguments will require consideration at this time.

Respondent contends, in support of the action of the trial court in setting aside the judgment recovered against him,

that the judgment was void on its face, and this for two reasons, namely, that the complaint failed to state facts sufficient to constitute a cause of action against him, and that the proof of service of notice of the overruling of his demurrer was insufficient.

From the record it appears that the plaintiff brought suit against the defendants as husband and wife to recover the sum of \$1,384.80, alleging in one count that this was the agreed price of certain merchandise sold and delivered to Katherine Chapin, the codefendant of respondent; in another count that it was the reasonable value of those goods, and in a third count that it was the amount of an account stated between plaintiff and said Katherine Chapin. Judgment was asked against both of the defendants. The respondent was served with process, and in due time he served and filed a general demurrer to the complaint, which was overruled; and the respondent having failed to answer within the time allowed by the court and by stipulations, default and judgment were entered against him. More than seven months thereafter, having employed other counsel, who now represent him, he moved to set aside the judgment on the ground, as before stated, that it was void on its face, and therefore an absolute nullity.

There can be no doubt that the demurrer to the complaint should have been sustained; but the court had jurisdiction of the parties and of the subject matter, and as the judgment entered was within the relief demanded, it follows, under the authorities, that, although the judgment be erroneous, it is not void. It was so decided in the case of *Blondeau v. Snyder*, 95 Cal. 521, [31 Pac. 591]. There both a mortgagor and the person to whom she conveyed the property, subject to the mortgage, were made parties defendant, and in the prayer of the complaint, in addition to other relief, the plaintiff demanded a deficiency judgment against both defendants. The action was dismissed as to the mortgagor, but her grantee, Mrs. Woodford, having failed to appear, a personal judgment was taken against her. There it was claimed that the complaint did not state facts showing a personal liability on the part of Mrs. Woodford for the mortgage debt, and therefore the court was without jurisdiction to declare such liability, and that the judgment in that respect was void. The supreme court held against

this contention, saying: "The judgment in this respect was within the relief demanded in the complaint and specified in the summons, and the court had jurisdiction, and indeed was required, to determine in that action whether upon the facts alleged the plaintiff therein was entitled to the relief which he demanded in his complaint. The court undoubtedly committed an error in finding such liability, but its judgment was not for this reason void. The error could have been corrected upon appeal from the judgment, or upon a proper showing by motion, if it had been made within the time limited by section 473 of the Code of Civil Procedure, but is now too late to do so by motion." (See, also, *In re James*, 99 Cal. 374, [37 Am. St. Rep. 60, 33 Pac. 1122]; *Canadian etc. Trust Co. v. Clarita Land etc. Co.*, 140 Cal. 672, [74 Pac. 301]; *Brush v. Smith*, 141 Cal. 467, [75 Pac. 55]; *McGinn v. Rees*, 33 Cal. App. 291, [165 Pac. 52].)

Nor is the judgment void on account of the clerical error in the affidavit of service of the notice of the order overruling the demurrer. Upon this question it appears that at the time the judgment was entered the original affidavit of service of notice of the overruling of the demurrer showed that such service was made upon certain attorneys who did not represent the respondent. Subsequently a corrected return of service was filed showing that service had in fact been made upon the true attorney of record for respondent, and that the statement in the original affidavit of service was an inadvertence. It is the contention of the respondent that the condition of the record at the time the judgment is entered controls, and as the record at that time failed to show a proper service, that the judgment is void. In support of this position we are reminded that the clerk in entering a judgment acts merely in a ministerial capacity, and unless he confines himself strictly within the statute, his acts can have no binding force. It is true that the clerk exercises no judicial functions, and that no intendments can be indulged in support of the validity of his acts. The statute directs the judgment. The clerk acts as the agent of the statute. If the law does not authorize the act, the judgment is without authority and is void. If, however, in a case where the authority of the clerk is undoubted and he errs, his act is not void, but only erroneous. His error can be corrected on motion made in time or on appeal. A judg-

ment, therefore, based on his erroneous exercise of jurisdiction, until modified or reversed is valid. (Freeman on Judgments, secs. 129, 534; 1 Black on Judgments, sec. 88.)

In asserting this doctrine we are not unmindful of the case of *Reinhart v. Lugo*, 86 Cal. 398, [21 Am. St. Rep. 52, 24 Pac. 1089], upon which respondent mainly relies, which is to the effect that where the proof of service is defective at the time of entry of judgment, the act of the clerk is invalid and void. That case, however, was expressly overruled in *Herman v. Santee*, 103 Cal. 524, [42 Am. St. Rep. 145, 37 Pac. 509], as not being in harmony with the weight of authority upon the subject. Contrary to the doctrine laid down in the Reinhart case, it is the fact of service which confers jurisdiction, and where the proof of such service is absent or defective, it may be amended or supplied. So, as here, where the facts respecting the service of the notice as disclosed by the return on file were not sufficient to establish a valid service, still the judgment will be sustained, even when entered by default, by proof of the actual existence at the time of its entry of the requisite jurisdictional facts. This proof is permitted not for the purpose of authorizing the court to enter a new judgment, but to show that the judgment previously entered was not without jurisdiction, and never was void. (Freeman on Judgments, sec. 89b; *Herman v. Santee*, *supra*.) In this respect we can see no reason in principle for any distinction between judgments entered by a court and those entered by the clerk in pursuance of the terms of the statute.

In *Hallock v. Jaudin*, 34 Cal. 167, it is said that, although entered by the clerk in conformity with the statute, the judgment is deemed in law to have been rendered by the court. (See, also, 6 Ency. of Pl. & Pr. 102.) To the same effect is *Dillon v. Porter*, 36 Minn. 341, [31 N. W. 56], where it is held that the action of the clerk in entering judgment in cases of this kind is to be taken as the action of the court, and the fact that a particular entry is improper, unauthorized, and erroneous does not render the judgment void any more than if it were entered under the immediate direction of the court itself. In this case it is stated that a contrary doctrine prevails in this state. This declaration, no doubt, is based upon expressions found in some of the earlier cases, culminating in the decision of *Reinhart v. Lugo*, *supra*.

Aside from these considerations we are of the opinion that the judgment was in no manner affected by the defective return. A judgment is void on its face when that matter is made apparent by an inspection of the judgment-roll. Here the service of the notice was not jurisdictional, nor did it form any part of the judgment-roll. Section 670 of the Code of Civil Procedure enumerates what documents constitute that record, and we find no mention of any proof of service of notice of decision upon demurrer, from which it must follow that failure to give such notice does not render the judgment void upon its face. (*Jacks v. Baldez*, 97 Cal. 91, [31 Pac. 899]; *California Central Creameries Co. v. Crescent City Light, W. & P. Co.*, 30 Cal. App. 619, [159 Pac. 209].)

Besides this, we are further of opinion that respondent is estopped from asserting that the notice was defective. It appears that his attorney obtained numerous extensions of time from appellant's attorney after the service of the notice within which to answer after demurrer overruled. Under these circumstances he cannot be heard to say that the time allowed him to answer does not begin to run until written notice of the order is given. (*Wall v. Heald*, 95 Cal. 364, 367, [30 Pac. 551]; *Estate of Keating*, 158 Cal. 109, 114, [110 Pac. 109]; *Bell v. Thompson*, 8 Cal. App. 483, [97 Pac. 158].)

Our attention has been called to the fact that the clerk erroneously entered judgment for an amount greatly in excess of what was actually due. While this act does not, as claimed, affect the judgment (*Bond v. Pacheco*, 30 Cal. 530), it is the duty of counsel for the appellant to see to it that respondent be credited with the excess amount. It is only fair to state that recognizing their duty as attorneys, counsel for appellant have expressed their willingness so to do, and beyond question the error will be rectified.

From what we have said it follows that the court, having no jurisdiction to set the judgment aside, the order so doing constituted error, and it is hereby reversed.

Beasley, J., *pro tem.*, and Zook, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 17, 1918.

[Crim. No. 418. Third Appellate District.—June 18, 1918.]

THE PEOPLE, Respondent, v. WILLIAM YEE, Appellant.

**CRIMINAL LAW — MURDER — EVIDENCE — INSTRUCTION AS TO MANSLAUGHTER—PROPER REFUSAL.**—Where in a prosecution for murder the evidence showed the deceased was deliberately and wantonly shot to death without cause or provocation, and the defendant relied upon and attempted to establish an *alibi*, the court properly refused to give an instruction defining manslaughter.

**ID.—AIDING, ASSISTING, AND ABETTING IN COMMISSION OF CRIME — GUILT OF ACCESSORY — PROPER INSTRUCTION.**—An instruction that one aiding, assisting, and encouraging another in committing a criminal act is guilty equally with the perpetrator, and that to justify conviction it must be shown he aided, assisted, and abetted therein, is a correct statement of the law of accessories, declared in sections 31 and 971 of the Penal Code, the word "abetted" including knowledge of the wrongful purpose of the perpetrator and counsel and encouragement in the crime.

**ID.—INSTRUCTION—ACCESSORIES.**—Where in a prosecution for murder two others were charged with the defendant with the commission of the homicide, and the district attorney in his argument to the jury declared that under the evidence they were justified in finding defendant guilty, although they might find that he did not himself actually do the killing, it was necessary for the court to read to the jury an instruction embracing the principle declared in sections 31 and 971 of the Penal Code, as to accessories in crime.

**ID.—MOTIVE FOR CRIME—EXISTENCE OF "TONG WAR" AMONG CHINESE—ARGUMENT OF DISTRICT ATTORNEY—EVIDENCE—LACK OF PREJUDICE.** Where in a prosecution of a Chinaman for murder, the evidence was sufficient to warrant a conviction, without showing motive, the argument of the district attorney declaring the existence of a "tong war" and that the homicide resulted from it was harmless.

**ID.—MOTIVE—WHEN IMMATERIAL.**—While proof of motive is important in a case wholly dependent for its establishment upon circumstantial evidence, yet where the crime is established by direct evidence, proof of motive is entirely unimportant.

**APPEAL** from a judgment of the Superior Court of Sonoma County, and from an order denying a new trial. George H. Cabaniss, Judge Presiding.

The facts are stated in the opinion of the court.

W. F. Cowan, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones, Deputy Attorney-General, for Respondent.

HART, J.—The defendant, jointly with two other Chinese, named, respectively, Toy Yock and Lee Sing Park, was charged by information filed in the superior court of Sonoma County with the crime of murder. The defendant was given a separate trial and was convicted of murder of the first degree, the jury fixing the penalty at imprisonment for life. He appeals from the judgment and the order denying him a new trial.

The homicide occurred on Sunday, the eleventh day of March, 1917, at about the hour of 3 P. M., on the farm of one Finley, situated between four and five miles north of the city of Santa Rosa.

The deceased, one Hom Hong, at the time of the homicide, was employed as a laborer on the Finley ranch, as were some dozen or more other Chinese.

There is ample evidence from which the jury were warranted in finding these facts: That, at about the noon hour of the said eleventh day of March, one Potter, a taxicab driver at Santa Rosa, received an order by telephone from Sebastopol, a town situated a short distance from Santa Rosa, for a taxicab; that, acting upon the order so received, he drove to Sebastopol and upon reaching a point near that town was stopped by a Chinaman, who was standing in the middle of the road, waving his hand, evidently for the purpose of attracting the driver's attention and so stopping the machine. Potter brought the taxi to a stop and shortly thereafter four Chinese entered the machine, three taking seats inside and one taking the outside seat, riding by the side of the driver. Acting under the direction of the man sitting by his side, Potter took a circuitous route to the Finley ranch. Upon arriving at a point a short distance from the gate leading into the ranch, Potter was told by the Chinese to stop the machine, and, upon doing so, the four Chinese left the taxi, instructing Potter to remain at the spot where he had stopped until their return, which, they said, would not be over fifteen or twenty minutes. Three of the Chinese passed through the gate into the Finley prem-

ises and thence to the cabin near which an aged Chinese, one Won Fong You, who was employed as a foreman and who also devoted himself to looking after and attending the flower garden on the place, was walking about the garden. Won Fong You, observing the three Chinese, who were strangers to him, greeted and invited them into the cabin to partake of a cup of tea. The defendant and another of the three Chinese accepted the invitation, the third remaining outside the cabin. At this time, Hom Hong, the deceased, and a number of other Chinamen were engaged in chopping wood near the cabin. Finishing the tea, the two Chinese left the cabin and immediately went to the spot where Hom Hong was engaged in chopping wood "on a block," about thirty feet from the cabin, and the defendant at once opened fire upon Hong with a pistol, shooting at him five times, four of the bullets entering his body, almost instantly causing his death. The third Chinaman—the one who did not partake of tea—remained near the cabin door while the shooting was going on. After the killing of Hom Hong the defendant threw the pistol with which he did the shooting into the hop-field near by, and thereupon the three Chinese hastened to the place at which they had left the taxi, entered the machine, and ordered the driver to take them back to Sebastopol. On reaching a point near what is known as "Old Chinatown," in Sebastopol, the Chinese got out of the machine. The taxi driver, upon receiving pay for his services, started back to Santa Rosa, leaving the three Chinese at Sebastopol.

The sheriff of Sonoma County, having been immediately notified of the homicide after it occurred, started post haste for the Finley ranch, where, upon his arrival, he found the dead body of Hom Hong lying "crumpled" on the ground. The sheriff, shortly after his arrival, found a pistol, with five chambers, in the hop-field a very short distance from where the body of Hom Hong lay. Five empty cartridge shells were found in the weapon.

An inquest was held by the coroner on the evening following the day of the homicide and at the same time an autoptical examination of the body of the deceased was made by Drs. Temple and Scamell. It is not necessary to present herein a description of the several wounds, as given by the doctors at the trial. It is enough to say that the point of



entrance of each of the four bullets which went into the body of the deceased was such as conclusively to show that, when shot, the deceased had his back or side toward his assailant. In other words, it is obvious, from the point of entrance into the body of each of the bullets, that the deceased was at no time squarely facing the man who did the shooting.

The point first urged for a reversal grows out of the omission by the court to give to the jury an instruction defining manslaughter.

Instructions must be pertinent to the evidence received into the record, and, manifestly, it is not error to refuse or fail to give an instruction having no bearing upon any of the facts proved. The undisputed evidence in this case (synoptically given above) did not warrant an instruction defining manslaughter. According to the evidence, the deceased was assassinated—deliberately and wantonly shot to death without cause or provocation, and there was, therefore, no element of manslaughter in the act of killing. And certainly there was no such element in the case, so far as the defendant was concerned, for he relied upon and attempted to establish an *alibi*, and, as the position thus assumed by him in the case implied, he did not pretend to know anything about the homicide, how it occurred or by whom perpetrated, and, therefore, introduced no proof which would reduce or tend to reduce the crime to that of manslaughter. It was, as stated, according to the evidence produced by the people, a cold-blooded murder and nothing less. The supreme court has time and again very properly held that in such a case it is not error for the trial court to refuse or omit to instruct the jury upon manslaughter. (See *People v. Turley*, 50 Cal. 469; *People v. Lee Gam*, 69 Cal. 552, [11 Pac. 183]; *People v. Chavez*, 103 Cal. 408, [37 Pac. 389]; *People v. Chaves*, 122 Cal. 134, 140, [54 Pac. 596]; *People v. Fellows*, 122 Cal. 233, 240, [54 Pac. 830].)

It is next contended that the court should have given to the jury a more definite definition of "an absent accessory and what acts were required of such accessory to constitute guilt" than it did.

According to the evidence, the defendant was not an "absent accessory," by which is meant a participant in the commission of the crime who was not present at the scene of the

crime when it was committed and who did not actually commit the criminal act. As has been shown, the defendant, under the evidence, was either present at and took an active part in the commission of the crime, or, accepting the proof addressed to his attempted *alibi*, had no connection whatever with the crime or the commission thereof. Of course, it was proper, and, indeed, necessary, for the court to read to the jury an instruction embracing the principle declared in sections 31 and 971 of the Penal Code as to accessories in crime, for the reason that the defendant was charged with two others with the commission of the homicide, and for the further reason that the district attorney, in his argument to the jury, declared that, under the evidence, they were justified in finding the defendant guilty, although they might find that he did not himself actually do the killing. And the court did so instruct the jury as follows: "If two or more persons plan and undertake the commission of a criminal offense and pursuant to that agreement the actual criminal offense or act denounced by the law as a crime is committed by one of the several parties, he being aided and assisted and encouraged in so doing by the other or others with whom he has so planned or agreed, under our law the participants in a criminal act accomplished under those circumstances are alike guilty. That is to say, those, if such there be, who *aided, assisted, and abetted* the commission of the act or participated in the commission of the crime as just stated are deemed by the law as guilty of the act as they would have been, you might say, had it actually been committed by them or one of their number."

It may be conceded that, under the decisions, the first part of the above instruction, taken alone, falls a little short of stating the rule correctly, for it would then merely have told the jury, in effect, that one aiding and assisting and encouraging another in committing a criminal act would be equally guilty with the perpetrator of the act himself. This, as stated, does not correctly state the rule, because one might innocently aid and assist and encourage another to commit an act which is criminal. (*People v. Dole*, 122 Cal. 486, 492, [68 Am. St. Rep. 50, 55 Pac. 581].) But, as will be observed, the court followed the language thus referred to with the statement that, to justify the conviction of one who did not himself actually commit the criminal act, it must be

shown that he aided, assisted, and abetted therein, the word "abetted," unlike the words immediately preceding it, including "knowledge of the wrongful purpose of the perpetrator and counsel and encouragement in the crime." (*People v. Dole, supra*; *People v. Bond*, 13 Cal. App. 175, 185, [109 Pac. 150].) Thus the rule was clearly and correctly stated to the jury, and it cannot be doubted that they well understood from it that, to warrant the conviction of a person who did not himself actually commit a criminal act, it was requisite to show that he abetted, or what is the equivalent in legal signification to that word, criminally or with guilty knowledge and intent aided the actual perpetrator in the commission of the act. Moreover, even if the instruction involved an erroneous statement of the rule, it could hardly be said to be prejudicial in its effect upon the rights of the defendant, inasmuch as all the evidence, save that which he offered in support of his claim of *alibi*, tended to show that he himself actually committed the act of killing.

The last point to which special attention is given in the appellant's brief is that the district attorney, for the purpose of developing in the minds of the jury a motive for the commission of the homicide, declared that there existed a "tong war" among the Chinese at about and before the date of the killing, and further declared that the defendant was a member of one of the hostile and warring tongs.

Conceding that there is no evidence in the record that a tong war was in progress and the killing of Hom Hong was the result of hostilities arising and existing between rival Chinese societies, still we do not think the defendant could have been harmed by the remarks of the district attorney in that particular. The evidence upon which the prosecution relied for a conviction was sufficient to warrant a verdict of guilty without showing motive or undertaking by argument to work one out of the evidence. While proof of motive is important in a case wholly dependent for its establishment upon circumstantial evidence, yet where the crime is brought directly home to the accused—that is, by direct evidence it is shown that he committed the crime—then the proof of motive is entirely unimportant. In this case, it is highly probable that the jury founded their verdict entirely on the direct testimony tending to show that the accused was one of the actual perpetrators of the crime and did not stop to

look for a motive or pay any heed to the remarks of the district attorney relative to motive or the existence of hostilities between rival Chinese factions. But an examination of the record will disclose that there was in the testimony *some* reference to a tong war, and this testimony came from the defense itself. It was brought out in this way: A Chinese witness for the people, named Bing Lee, testified that he saw the defendant and his companions alight from the taxicab near old Chinatown, in Sebastopol, on the day of the homicide and after the killing had taken place. Several witnesses, among them a police officer of Sebastopol, who was acquainted with Bing Lee, were called by the defense to testify, and did testify, that Bing Lee had not been seen in or about Sebastopol for several days before or after the eleventh day of March, 1917, and that he was not seen there on that day. Reference to page 517 of the transcript will show that counsel for the defense asked his witness, Sing Wo, if he did not hear that a tong war was on, and, if so, when he first heard of it, to which the witness replied that he heard of such a "war" before the killing of Hom Hong. And on page 523 will be found a like question to the police officer, who testified that he had received information of tong hostilities before the date of the homicide. It is true that the defendant was not shown to have been connected with either one of the warring tongs, but, in argument, it is permissible for an attorney to deduce any legitimate theory of the case which the evidence may reasonably afford, and since the attorney for the defendant himself seemed to assume that a tong war was in progress, and in fact filed an affidavit made by the defendant and upon which he predicated a motion for a continuance, in which it was declared without qualification that a tong war was going on prior to, at the time of, and after the homicide, we cannot say that the district attorney overstepped the record very far by referring to the existence of a tong war and the homicide as a probable culmination thereof. In any event, however, as above stated, the defendant could have suffered no prejudice from the district attorney's remarks.

The judgment and the order are affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Civ. No. 2414. Second Appellate District.—June 18, 1918.]

EDMON G. BENNETT et al., Respondents, v. C. D. HILLMAN, Appellant.

**JURY—FAILURE TO ANNOUNCE DESIRE AT TIME OF SETTING CAUSE—CODE AMENDMENT—IGNORANCE OF COUNCIL—REFUSAL OF RELIEF—DISCRETION NOT ABUSED.**—It is not an abuse of discretion to deny a motion made under section 473 of the Code of Civil Procedure for an order setting aside an assignment of an action for trial to a court without a jury, where such motion was made upon the ground that the defendant had failed to ask for a jury trial in time because of the ignorance of his counsel of the addition of subdivision 4 to section 631 of the Code of Civil Procedure, predicated waiver of right to jury trial on failure to announce such desire at the time when the cause is first set for hearing.

**ID.—WAIVER OF RIGHT TO JURY TRIAL—FAILURE TO ANNOUNCE DESIRE AT SETTING OF CAUSE—CODE AMENDMENT CONSTITUTIONAL.**—Subdivision 4 of section 631 of the Code of Civil Procedure is not unconstitutional under the language of section 7 of article I of the constitution, to the effect that a trial by jury may be waived in civil actions by the consent of the parties signified in such manner as may be prescribed by law.

**'APPEAL** from a judgment of the Superior Court of Los Angeles County. John W. Shenk, Judge.

The facts are stated in the opinion of the court.

Wm. Hazlett, Haas & Dunnigan, and Arthur C. Vaughan, for Appellant.

Oscar Lawler, and Bertin A. Weyl, for Respondents.

**WORKS, J., pro tem.**—The plaintiffs are attorneys at law and the action was brought to recover from defendant the value of services rendered to him by them and to recover cash advances made by them in connection with the services. The plaintiffs had judgment for nearly twenty-one thousand dollars and the defendant appeals.

The first contention of the appellant is that he was improperly denied the right of trial by jury in the action. The question presented largely concerns the provisions of subdivision 4 of section 631 of the Code of Civil Procedure. That

subdivision was added to the section by the legislature through an act passed May 20th and which took effect August 8th, both in 1915. So much of the section as is material to the present controversy, including subdivision 4, is as follows: "Trial by jury may be waived by the several parties to an issue of fact . . . in manner following: . . . 4. By failing to announce that a jury is required, at the time the cause is first set upon the trial calendar if it be set upon notice or stipulation, or within five days after notice of setting if it be set without notice or stipulation."

On a day between December 22d and December 27th, both in 1915, the parties entered into a written stipulation that the action might, on the latter day, be set for trial. On that day it was by the court set for May 4, 1916, in a department of the court in which jury trials are not held ordinarily, and also on that day, December 27th, notice that the cause had been set down for May 4th in the department mentioned was served on the counsel for the appellant. At the time the cause was set for trial the appellant did not announce that he desired a jury trial thereof. Under notice dated April 28, 1916, the appellant notified the respondents that on May 1, 1916, he would move the court "for an order setting aside the assignment" of the action "to the court and without a jury and setting said action upon the trial calendar to a jury or transferring said action to a department of the court where a trial by jury may be had." The notice was accompanied by affidavits of the appellant and of the attorney who was then his sole counsel, to the effect that the appellant had always desired and intended that the action should be tried by a jury; that at about the time the answer was filed, which was before December 22, 1915, the appellant instructed his counsel to demand a jury trial; that thereupon his counsel informed him that under the law a jury could be demanded at any time before the commencement of the trial, that a jury trial could be had upon such demand, and that he, the counsel, would make the demand in proper time; that the appellant knew nothing about the law in the premises except as it was so imparted to him by his counsel; that the counsel did not know until April 27, 1916, that subdivision 4 had been added to section 631 of the Code of Civil Procedure; that he first informed the appellant of that change in the law on that

date; that the appellant had no knowledge, until that date, that such was the law or that his counsel had not theretofore demanded a jury trial; that, on April 27, 1916, the appellant informed his counsel that he had relied upon such counsel to procure for him a jury trial, and that he desired, and still insisted, that the action be tried by a jury; that the last time the appellant's counsel had demanded a jury trial of any action was shortly before the amendment of section 631, adding subdivision 4, had become effective; that pursuant to such demand the court had ordered a jury trial at a time long after the cause wherein the demand was made had been first set upon the trial calendar for trial; and that the counsel fully believed, until April 27, 1916, that a jury could be demanded in this action at any time before 10 o'clock of the forenoon of May 4, 1916, and that the appellant had the right to demand a jury trial at any time prior to that date. There was also an affidavit of merits.

Upon the making of the motion and the submission of the affidavits, the trial court entered an order denying the motion on the ground that a jury trial had been waived. In the order it was recited that the department of the court in which the action had been set down was, and had been at all times during the pendency of the action, a department designated by the court for the trial of civil actions without a jury; that there was no jury in attendance in that department; that there were at all times two or more departments of the court in which civil actions in which juries were demanded were regularly set and tried; that the assignment of causes for trial as above indicated was pursuant to rules of the court duly adopted and in effect for many years past; and that, were the motion to be granted, it would be necessary to transfer the cause to the department of the presiding judge for reassignment to a jury department in which the cause would, in the ordinary course of the business and practice of the court, be reset for trial before a jury at a date many months in the future.

The appellant's motion was made under section 473 of the Code of Civil Procedure, which entitles a party to be relieved from the effect of an order entered or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The section expressly provides that the right to such relief rests in the discretion of the

court; and that discretion is, of course, not subject to review on appeal except in cases in which its abuse is plainly shown. (*Plumer v. Mayhew*, 17 Cal. App. 223, [119 Pac. 202]; *Vinson v. Los Angeles Pac. R. Co.*, 147 Cal. 479, 483, [82 Pac. 53].) Under all the facts before the trial court we cannot say that there was an abuse of discretion in denying the motion presented to it by the appellant. On the contrary, it appears that the court was amply justified in ruling as it did upon the question.

The appellant insists that subdivision 4 of section 631 is unconstitutional, under the language of section 7 of article I of the state constitution, to the effect that "trial by jury may be waived . . . in civil actions by the consent of the parties, signified in such manner as may be prescribed by law." This language of the section follows a statement that "the right of trial by jury shall be secured to all, and remain inviolate." The appellant argues that the consent which will amount to a waiver of the right to jury trial must be express, and that it will not do for the legislature to predicate it upon a failure of a party to announce that he desires a jury at the time his cause is first set for hearing. This contention has been answered, in effect, in *City of Los Angeles v. Zeller*, 176 Cal. 194, [167 Pac. 849], in which the constitutionality of a section of a certain act of the legislature regulating the right to trial by jury in street opening cases was established. That section was, in legal effect, substantially like subdivision 4 of section 631 of the code. We say the case cited answers the contention of the appellant in effect, for the reason that the precise point now made seems not to have been presented to the supreme court in that case. Nevertheless, the reasoning of the opinion sufficiently answers it. We conclude that subdivision 4 of section 631 shows a proper exercise by the legislature of the power to prescribe the manner in which the right to trial by jury may be waived.

The final contention of the appellant is that the findings by which the trial court determined that the respondents were employed by the appellant and fixed the value of their services are not supported by the evidence. There was evidence of the employment, as well as of the experience and qualifications of the respondents, and the record shows, in hundreds of typewritten pages, of what the services of the



respondents consisted. The nature of the services rendered was stated in questions addressed to prominent members of the Bar, and four or five of them testified that the reasonable value of the respondents' labors for the appellant was in a sum much in excess of the amount found due them by the court. The record surely shows an ample basis for the findings made. The finding as to the value of the services has a sufficient support in the testimony, alone, of the members of the Bar who appeared as witnesses. (*Prince v. Kennedy*, 3 Cal. App. 498, [86 Pac. 609].)

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 15, 1918.

---

[Civ. No. 2399. First Appellate District.—June 19, 1918.]

W. W. ERSKINE, Respondent, v. R. H. MARCHANT et al.,  
Appellants.

**CONTRACT—SALE OF CALCULATING MACHINES—REPUDIATION BY PRINCIPAL—ESTOPPEL TO CLAIM FORFEITURE.**—In an action by an agent on a contract of employment for the sale of calculating machines, providing for forfeiture if he did not sell fifty machines the first year, where the defendants repudiated the contract two and one-half months after it had been executed, they were estopped from claiming forfeiture for nonsale of the required number of machines.

**ID.—PROFITS FROM SALES OF OTHER MACHINES—MITIGATION OF DAMAGES—LACK OF EVIDENCE.**—In such an action, profits made by plaintiff on sales of machines purchased by him from another firm are not available in mitigation of damages, in the absence of evidence as to the capital invested by plaintiff or how many he sold.

**ID.—COMMERCIAL AGENTS AND PRINCIPALS—DAMAGES FOR BREACH.**—While contracts between commercial agents and their principals embody many elements of uncertainty, damages for breach thereof are not speculative or remote, and such compensation will be awarded as the evidence shows with reasonable certainty the wronged party is entitled to.

**APPEAL—CONSTRUCTION OF FINDINGS—SUPPORT OF JUDGMENT.**—Courts may find damages in a lump sum, and any uncertainty in the findings is to be construed so as to support the judgment rather than defeat it.

**APPEAL** from a judgment of the Superior Court of Alameda County. Wm. H. Waste, Judge.

The facts are stated in the opinion of the court.

Henry C. McPike, for Appellants.

Alexander D. Keyes, and Herbert W. Erskine, for Respondent.

**THE COURT.**—This is an appeal from a judgment awarding plaintiff \$7,839.46 for breach of contract. The contract, which was in writing and attached to and made a part of the complaint, was made on the seventeenth day of May, 1913, and appointed plaintiff the defendants' agent for the sale of its calculating machines, called the "Marchant," for a period of five years, with the privilege of renewing the contract for five years, and with the exclusive right of sale on commission in the state of California, save to certain designated firms, to which the defendants reserved the right to sell its machines. The contract contained a clause that the plaintiff would forfeit all rights under the contract if fifty sales were not made in the state of California during the first year of the agreement. On the third day of August, 1913, defendants notified plaintiff that they had sold their business to a corporation, and that the corporation would not accept the agreement between them and the plaintiff. On receipt of a letter from the corporation a few days later, the plaintiff with his attorney called at the office of the corporation, where he was told by some of the officers of the corporation that they would not proceed under the written contract, but that they would permit him to go on selling the Marchant machine and would pay him a commission on such sales as he made. Plaintiff accepted that arrangement upon the express understanding that by so doing he was not waiving his rights under the original contract. Before the repudiation of the written contract plaintiff had sold seven machines, for which he had received his commission in full

from defendants. After the repudiation he continued to sell machines for the corporation until April, 1914, selling in all eleven machines, for which he was paid his commissions by the corporation. The evidence showed that between May 17, 1913, and May 17, 1914, eighteen machines were sold by plaintiff and twenty by the Marchant Company.

Appellants claim that as the contract provided that it should be forfeited if fifty machines were not sold within the first year, and as the combined sales of the plaintiff and the other agents of the corporation did not total fifty machines, the plaintiff's damages should have been limited to the loss of his commission for the first year of the contract. Inasmuch as the defendants repudiated their contract two months and one-half after it had been executed, they are estopped to claim the benefit of the forfeiture clause for the nonsale of fifty machines. (*Schiffman v. Peerless etc. Co.*, 13 Cal. App. 600, [110 Pac. 460].) Moreover, the fact that plaintiff continued to sell the Marchant machine after the repudiation of the contract by defendants, and that he did not sell the amount required in the forfeiture clause, is not proof that he would not have sold the requisite number had he been acting under the original contract as the exclusive agent, actively interested in the sale of that machine.

The contention that an allowance should have been made in mitigation of damages of profits made by plaintiff, after the breach of the contract, in the purchase and sale of a similar machine, known as the "Dactyle," is without merit. There was evidence to the effect that plaintiff purchased some Dactyle machines in Paris; that he was not the agent for the sale of the Dactyle machine, but merely purchased and sold them. But how much available capital he had to invest in the purchase of these machines, how many he purchased, or how many he sold, was not shown. In order to mitigate damages it was incumbent upon the defendants to introduce evidence from which plaintiff's profits in the sale of Dactyles could be estimated with some degree of certainty. While contracts between commercial agents and their principals embody many elements of uncertainty, the damages for breach thereof are not speculative or remote, and courts award such compensation as the evidence shows with reasonable certainty the wronged party is entitled to. (Suther-

land on Damages, sec. 69; *Wakeman v. Wheeler & W. etc. Co.*, 101 N. Y. 205, [54 Am. Rep. 676, 4 N. E. 264].)

It is further contended that in awarding damages the court did not take into consideration the difference between the entire commission for each sale and what it would cost the plaintiff to make the sale. While it does not appear what elements the court considered in ascertaining the amount of damages, there was nothing in the court's finding to show that these costs and expenses were not taken into consideration. The court found that by reason of defendants' breach of the contract plaintiff had been damaged in the sum of \$7,839.46. It has been held that courts may find damages in a lump sum, and that any uncertainty in the findings is to be construed so as to support the judgment rather than to defeat it. (*Murphy v. Stelling*, 8 Cal. App. 702, 705, [97 Pac. 672]; *Foley v. Martin*, 142 Cal. 256, 261, [100 Am. St. Rep. 123, 71 Pac. 165, 75 Pac. 842].) The trial court had before it evidence of the sales made by the plaintiff and the defendants prior and subsequent to the breach of the contract from which it could form a judgment as to the amount of plaintiff's loss, and from the record before us we cannot say that the trial court erred in estimating the damages.

Judgment affirmed.

A petition for a rehearing of this cause was denied by the district court of appeal on July 19, 1918, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 15, 1918.

---

[Civ. No. 2011. First Appellate District.—June 20, 1918.]

**A. R. CATANIA, Appellant, v. BOARD OF EDUCATION  
OF THE CITY OF OAKLAND et al., Respondents.**

**SCHOOL LAW—DISCHARGE OF TEACHER—CITY OF OAKLAND—POWER OF  
BOARD OF EDUCATION.**—The board of education of the city of Oakland had unrestricted and absolute power to discharge a teacher in its school department for the ensuing fiscal year by giving the notice required by section 1617, subdivision 7b (now section 1609),  
87 Cal. App.—38

of the Political Code, and *mandamus* will not lie to compel such board to reinstate a teacher dismissed for violating a rule of the board which provided that when a woman employee married, her position should become vacant.

**APPEAL** from a judgment of the Superior Court of Alameda County. William H. Waste, Judge.

The facts are stated in the opinion of the court.

Gerald H. Catania, and W. W. Sanderson, for Appellant.

W. H. L. Hynes, District Attorney, and Walter J. Burpee, Assistant District Attorney, for Respondents.

**KERRIGAN, J.**—Plaintiff herein by mandate sought reinstatement in the school department of Oakland, and for her salary, amounting to the sum of one thousand two hundred dollars a year, during the time she had been deprived of her alleged right to teach. In the court below, after trial, the writ was denied, findings were waived, and judgment was had that plaintiff take nothing by her action.

From the facts it appears that the city of Oakland is organized under section 1576 of the Political Code as Oakland School District of Alameda County, and is governed by a city board of education elected under a freeholders' charter. Plaintiff, A. R. Catania, had for a number of years prior to July 30, 1916, been regularly employed by said district as a school-teacher. Previous to September 20, 1915, she had been a single woman, but on that date she intermarried with Gerald Catania. The Oakland board of education had a rule, adopted in 1913, which provided in substance that when a woman employee married, her position should become vacant. Petitioner having placed herself within the operation of this rule, the board of education by resolution decided that it would no longer employ plaintiff, and written notice to this effect was served upon her.

The statute relating to the employment and discharge of teachers was at that time found in subdivision 7b of section 1617 of the Political Code, but is now contained in section 1609 of that same code by amendment of 1917, and reads as follows:

"The powers and duties of trustees of common school districts, and of boards of education in city school districts are as follows: . . .

"(b) To employ the teachers, and immediately notify the county superintendent of schools, in writing, of such employment, naming the grade of certificate held by the teacher employed; also to employ janitors and other employees of the school; to fix and order paid their compensation, unless the same be otherwise prescribed by law; provided, that no board shall enter into any contract with such employees to extend beyond the close of the next ensuing school year; except that teachers may be elected on or after June 1st for the next ensuing school year, and each teacher so elected shall be deemed re-elected from year to year thereafter unless the governing body of the school district shall on or before the 10th day of June give notice in writing to such teacher that his services will not be required for the ensuing school year. Such notice shall be deemed sufficient and complete when delivered in person to the teacher by the clerk or secretary of the governing body of the school district, or deposited in the United States mail with postage prepaid addressed to such teacher at his last known place of address," etc.

The charter of the city of Oakland contains a similar provision upon this subject.

On June 8, 1916, the board of education passed a formal resolution providing that the services of certain teachers and employees of Oakland school district would not be required during the ensuing fiscal school year beginning July 1, 1916, and directed its secretary to give the statutory notice. Appellant was one of the teachers whose services were thus dispensed with. The general law and the charter provision are in conflict with reference to the time such notice should be given. Notice was given under section 1617 of the Political Code, and no question is raised as to the sufficiency of the notice in point of time.

Shortly after receiving this notice plaintiff addressed a letter to the board asking why she was dismissed. The secretary was directed by the board to reply by quoting to her the rule regarding the employment of married teachers. The rule is as follows: "In case of the marriage of a woman employed by the board of education, her position shall at once become vacant."

At the next ensuing school term the board declined to permit plaintiff to teach. There had been no abolition nor consolidation of classes in the grade taught by plaintiff, and the class which plaintiff had taught was in charge of another teacher.

The question then presented for consideration is the validity of the board's action in discharging plaintiff.

The grounds upon which appellant relies for a reversal are two:

1. That the board of education was guilty of abuse of discretion in discharging plaintiff.

2. That under the statute plaintiff is entitled to her position until her services are no longer "required," subject only to removal for insubordination or other causes specified in section 1793 of the Political Code.

With reference to the first contention it is the claim of petitioner that the rule, for the violation of which she was dismissed, is illegal and void, as it operates as a restraint upon marriage, and also discriminates against women, and in this respect violates the direct inhibition of article XX, section 18, of the state constitution, which provides: "No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business, vocation, or profession."

She further claims that the rule is unreasonable and oppressive, for the reason that no educator has ever advocated the disqualification of married women as teachers, but, on the contrary, experts in pedagogy have warned against the present tendency to leave the instruction of our youth entirely in the hands of unmarried women, and have demanded a wider field in our educational system for the larger and broader and more sympathetic outlook of the teacher who has become a wife and, perhaps, a mother.

Whatever the views of educators may be upon this subject, we are concerned only with the validity of the board's action in discharging plaintiff.

It is a general rule that courts will not by *mandamus* disturb decisions and actions of subordinate boards and officers having discretionary powers. It is true that in the exercise of such powers an officer will not be permitted to act arbitrarily or capriciously. If, therefore, the statute contemplates that a dismissal must be for some reasonable cause,

then the board is subject to judicial check in the exercise of its power of removal. In the absence of constitutional or statutory provisions, however, the power to discharge is always absolute. Here no civil service in relation to school district employees, of which plaintiff was one, is contemplated. On the contrary, there is no provision relating to the permanency of their tenure except that found in section 1617 of the Political Code and section 192 of the Oakland charter, and these sections provide for the manner of discharge, and contain no limitations upon its exercise except the statutory limitation as to time. If the contention of appellant be correct, teachers in a like position with appellant have the benefits of civil service rights and permanency of tenure. We are cited to the case of *Richards v. District School Board*, 78 Or. 621, [Ann. Cas. 1917D, 266, L. R. A. 1916C, 789, 153 Pac. 482], as insuring such tenure. There a teacher was dismissed under a rule similar to the one here involved; but in that case the board was authorized to dismiss only for good cause shown, and it was for this reason that reinstatement was had. It was there held, however, in referring to the first section of the statute involved—which provided that the board should have power and authority to appoint and remove, hire, and discharge all teachers and employees—that if this section stood alone, there would be ample reason to support the contention that the power to dismiss was unrestricted. Here the right of removal stands alone; and it has been uniformly held in this state that boards of education may exercise an unlimited discretion in the employment and dismissal of teachers under like employment with appellant (*Kennedy v. Board of Education*, 82 Cal. 483, [22 Pac. 1042]; *Barthel v. Board of Education*, 153 Cal. 376, [95 Pac. 892]; *Stockton v. Board of Education*, 145 Cal. 246, [78 Pac. 730]; *Loehr v. Board of Education*, 12 Cal. App. 671, [108 Pac. 325]). This being so, it follows that the power of the board to discharge plaintiff was unrestricted and absolute.

The second contention, that school-teachers now have, under the statute, a permanency of tenure, subject, first, to the power of the board to remove at any time for insubordination, etc., under section 1793 of the Political Code, and, second, at the end of the school term when it is determined that, by reason of consolidation of classes, closing



of schools, etc., her services will no longer be needed, is without merit. The use of the word "required" was intended merely to designate the period in which the persons enumerated would be permitted to hold in the pleasure of the board, and was never intended to insure any permanency of tenure beyond the period stated. The legislation clearly shows this intent. The argument that this construction might lead to a wholesale change in the personnel of the teaching force lends no weight. This is possible though, as counsel suggests, fortunately not common in the field of education. If the legislation is not wise, it is not our province to alter it. The remedy is elsewhere.

The judgment is affirmed.

Beasley, J., *pro tem.*, and Zook, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 19, 1918.

---

[Civ. No. 2409. First Appellate District.—June 21, 1918.]

ISAAC F. KYDD, Appellant, v. CITY AND COUNTY  
OF SAN FRANCISCO et al., Respondents.

**MUNICIPAL CORPORATIONS—SAN FRANCISCO—PUBLIC UTILITY ACQUIRED BY CITY—PREFERENCE IN APPOINTMENT OF EMPLOYEES.**—Under article XIII, section 11, subdivision B, of the charter of the city and county of San Francisco, only employees of a municipal railway acquired by the city who have secured standings in examinations are entitled to preference in appointment.

**ID.—DISCHARGE OF EMPLOYEES OF MUNICIPAL RAILROAD.**—In view of section 11, article XIII, subdivision A, of the charter of the city and county of San Francisco, an employee of a municipal railway is subject to discharge and suspension at any time without trial, and section 12, of article XIII, providing that no employee in classified service shall be removed except for cause upon written charges, is inapplicable.

**PLEADING—ORDER SUSTAINING DEMURRER—SILENCE AS TO AMENDMENT—JUDGMENT.**—An omission in an order sustaining a demurrer to a complaint to say anything about leave to amend does not prevent judgment from being entered.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

Devoto, Richardson & Devoto, for Appellant.

George Lull, City Attorney, and Maurice T. Dooling, Jr., Assistant City Attorney, for Respondents.

KERRIGAN, J.—This is a proceeding for a writ of mandate to compel the board of public works of the city and county of San Francisco to restore petitioner to a place of employment on the municipal railway. A demurrer to the third amended petition was sustained by the court below, before whom the proceeding was had, and appellant having failed to further amend, judgment was entered in favor of defendants and against petitioner, and from this judgment this appeal is taken.

The substance of the facts as alleged in the third amended petition may be stated as follows: That on December 10, 1913, and for twenty years prior thereto, petitioner was employed in the operating service of the "Presidio and Ferries Railroad Company" in San Francisco, and that under such employment he "had absolute charge and control of the operation of said street railroad"; that on the tenth day of December the franchise of said railroad expired and it was acquired by the city and county of San Francisco; that petitioner was continued in said position from that date until June 1, 1914, at the same salary he was paid while in the employ of the Presidio and Ferries Railroad Company, at which time he was notified that he had been granted a leave of absence and need not report for work any longer, and has not been allowed to continue his duty and employment ever since; that he has demanded reinstatement, which has been refused.

Appellant bases his action on section 11, article XIII, of the San Francisco charter. That subdivision provides as follows:

"Subdivision B. The following persons securing standing on the eligible lists in examinations shall be preferred for appointment:

"1. Persons employed in the operating service of the Geary Street, Park and Ocean Railroad Company on May 5, 1912, such preference to be solely for employment in the municipal railroad service:

"2. Persons employed in the operating service of any public utility acquired by the city who have been so employed for not less than one year; and such persons so employed at the time a public utility is acquired by the city shall continue in their positions."

It is the contention of plaintiff that under this subdivision, it being in force and effect on the tenth day of December, 1913, when the defendant acquired the Presidio and Ferries Railway as a public utility, he is entitled to employment by defendant of a like nature and at the same salary he was receiving at the time when the said public utility was so acquired. This contention is predicated upon the provisions of subsection 2 of subdivision B, it being argued that the examinations provided for in subdivision B have no reference to persons who may have been in the operating service for more than one year of a public utility acquired by the city, and that such persons unqualifiedly continue in their positions without the necessity of any examination.

Statutes must be so construed that the whole, if possible, may stand. So construed, the plain meaning of the statute is that the preference provided for was intended for those securing standing in examinations and to those alone. The petition not containing an averment of this precedent condition, the demurrer was properly sustained.

Irrespective of this conclusion, however, petitioner was subject to discharge or suspension at any time without trial.

Section 12, article XIII, of the San Francisco charter, providing for tenure of office by civil service employees, states that "no person employed in the classified civil service shall be removed or discharged except for cause upon written charges and after an opportunity to be heard in his own defense." It further provides that "the appointing officer or officers of a department may, for disciplinary or penal purposes, suspend a subordinate for a period not exceeding thirty days, and such suspension shall carry with it the loss of salary for the period of suspension." The section, however, concludes with the following language: "The

provisions of this section shall not apply to persons employed in the operating department of any public utility." Petitioner being within that class, the limitation upon the powers of dismissal and suspension thus provided for do not apply to him. Moreover, the manager or superintending head of a public utility is excepted from article XIII of the charter dealing with civil service (subd. a, sec. 11). In the absence of restraint imposed by statute, the power of appointment implies the power of removal.

Appellant further complains of the action of the court in entering judgment after the order sustaining the demurrer, such order being silent as to any amendment. This omission did not prevent judgment from being entered. (*Smith v. Taylor*, 82 Cal. 533, 541, [23 Pac. 217]; *Adwyn v. Cobe*, 168 Cal. 165, 172, [142 Pac. 79].) Appellant had already amended his complaint three times. The last demurrer was sustained May 31, 1917, and no steps were taken by him to further amend up to the time of the entry of judgment some four months later. From the facts as presented it is manifest that further amendment would have availed him nothing.

Judgment affirmed.

Beasley, J., *pro tem.*, and Zook, J., *pro tem.*, concurred.

---

[Crim. No. 609. Second Appellate District.—June 21, 1918.]

In the Matter of the Application of W. I. TURCK for a Writ of Habeas Corpus.

**CRIMINAL LAW—RELEASE WITHOUT BAIL.**—Under the procedure generally applicable in criminal actions a defendant is not entitled to be released without bail upon his mere promise to appear for trial, nor will such release ordinarily be permitted by an arresting officer until it is so ordered by the court or magistrate.

**ID.—VIOLATION OF VEHICLE ACT—VALIDITY OF JUDGMENT OF CONVICTION.**—A judgment of conviction for a violation of section 22 of the Vehicle Act (Stats. 1917, p. 404) is not void on its face merely because it does not affirmatively declare that the defendant upon his appearance before the justice of the peace on the day of his arrest waived his right to the five days' time provided by subdivi-

sion (c) of said section, and does not affirmatively set forth that such justice was the most accessible magistrate.

**ID.—RIGHTS UNDER VEHICLE ACT—DENIAL BY JUSTICE'S COURT—REMEDY BY APPEAL—HABEAS CORPUS.**—The rights given to persons arrested for speeding under section 22 of the Vehicle Act may be waived, and their denial by the justice's court is mere error, correctible on appeal, but not reviewable under *habeas corpus*.

**APPLICATION for a Writ of Habeas Corpus** originally made to the District Court of Appeals for the Second Appellate District.

The facts are stated in the opinion of the court.

Ray E. Nimmo, for Petitioner.

W. F. Menton, for Respondent.

CONREY, P. J.,—The petitioner, W. I. Turck, being in custody of the sheriff of the county of Orange and imprisoned in the county jail of that county, applied to this court for a writ of *habeas corpus* and the writ was issued. Attached to the sheriff's return to the writ is a copy of a commitment issued by John B. Cox, as justice of the peace of Santa Ana Township, in the county of Orange. By that commitment it appears that on the twenty-eighth day of January, 1918, a complaint under oath was filed in said justice's court, charging that the petitioner on that day committed a misdemeanor, to wit, violation of the motor vehicle law; that a warrant of arrest having been issued on that day and defendant having been arrested, thereafter on the same day he appeared before said court and was informed of all his legal rights; that the complaint in the action having been read to him, the defendant pleaded guilty and was by the court found guilty as charged in the complaint; thereupon, the defendant having waived time for the pronouncing of judgment, it was adjudged that for said offense defendant be imprisoned in the county jail of the county of Orange for the term of ten days.

The complaint upon which the defendant was prosecuted in the justice's court charged that at the time and place stated he did willfully and unlawfully operate an automobile upon a public highway in the county of Orange, at a

rate of speed in excess of thirty miles per hour. This was a violation of the provisions of section 22 of the Vehicle Act. (Stats. 1917, p. 404.) Subdivision (c) of said section 22 reads as follows: "In case of any person arrested for violation of the provisions of this section, unless such person shall demand that he be taken forthwith before the most accessible magistrate, the arresting officer shall take the name and address of such person and the number of his motor vehicle and notify him in writing to appear before a designated magistrate at a time and place to be specified in such writing at least five days subsequent to the date of such notice and upon the promise in writing of such person to appear at such time and place, such officer shall forthwith release him from custody. Any person willfully violating such promise shall be guilty of a misdemeanor regardless of the disposition of the charge upon which he was originally arrested."

The alleged illegality of the commitment on which Turck is held in custody is set forth in the petition for the writ, in substance, as follows: That it does not appear upon the face of the proceedings that the defendant waived his right to the five days' time provided by said statute, and that it does not appear that the said justice of the peace was the most accessible magistrate at the time of the arrest of the defendant; that, in fact, John B. Cox, the said justice of the peace, was not at the time and place of arrest of the defendant the most accessible magistrate, but that there was then and there a magistrate in the town or township of Tustin, in the county of Orange, who was then and there located at a point nearer and more accessible to the defendant and the officer arresting him at the time of his arrest; that upon the face of the complaint it appears that the defendant was required to appear before the said justice, and did so appear, on the day of his arrest, and that the five days required by the statute had not elapsed. By reason of the facts so alleged, petitioner claims that said Justice of the Peace Cox had no jurisdiction to entertain said complaint filed with him on the twenty-eighth day of January, 1918, and had no jurisdiction to issue the alleged commitment, and that therefore said commitment is void.

Petitioner's argument begins with the general proposition that a justice's court is an inferior court, whose powers are conferred and whose duties and mode of procedure are

prescribed by statute, and to which the rule applies that the evidence of its proceedings must affirmatively show jurisdiction of the person of the defendant and of the subject matter. The rule has been illustrated in a series of cases, among which petitioner especially relies upon *Ex parte Kearny*, 55 Cal. 212. The particular application of the rule in that case was that the court determined that the alleged offense stated in the complaint in the police court where the petitioner was convicted did not constitute any crime against the law, and that therefore the petitioner was entitled to be discharged on *habeas corpus*. In *Ex parte Greenall*, 153 Cal. 767, 770, [96 Pac. 804, 806], the court said: "It has been the uniform practice to consider on *habeas corpus* the question of the sufficiency of the complaint in such inferior courts, and to discharge the prisoner where such complaint failed to show a public offense under the laws of the state."

The courts have been careful, however, not to extend the principles above stated so far as to interfere with the use of the right of appeal as the ordinary remedy of a defendant in a criminal case. "The writ of *habeas corpus* is not intended to review the regularity of the proceedings in any case, but rather to restore to his liberty the citizen who is imprisoned without color of law." (*In re Kowalsky*, 73 Cal. 120, 122, [14 Pac. 399].) "A writ of *habeas corpus* cannot be made the vehicle of determining mere errors, where a conviction has been had and the commitment thereon is in due form. If the court below had no jurisdiction of the offense charged, or if it affirmatively appears by the record that the prisoner was tried and sentenced for the commission of an act which, under the law, constitutes no crime, the judgment is void and the prisoner should be discharged." (*Ex parte Miranda*, 73 Cal. 365, 371, [14 Pac. 888, 891].) In *Ex parte Turner*, 75 Cal. 226, [16 Pac. 898], it appeared that in a police court the petitioner had been convicted of a misdemeanor. The judgment did not recite the date of the offense or state the elements of the crime as fully as they were necessarily stated in the complaint. Nevertheless the petitioner was remanded, the court saying: "The distinction between a void and a voidable judgment is sometimes very nice, and the judgment will fall under the one class or the other accordingly as it is regarded for different pur-

poses. . . . After trial and conviction the commitment is of a higher dignity than an ordinary commitment holding to answer. This is true with courts, both of special or limited jurisdiction and those of general jurisdiction. The judgment of a court of inferior jurisdiction is, to a great extent, as far beyond the reach of collateral attack by the writ of *habeas corpus*, as the judgments of higher courts are. (Church on Habeas Corpus, sec. 240.) . . . The failure of the court to state the elements of the crime in the judgment as fully as they were necessarily stated in the complaint does not render the judgment void. The offense is sufficiently designated in the judgment. To entitle the petitioner to a discharge, we must necessarily assume that the record of conviction fails to show the commission of any offense. To reach this conclusion, we should have to resort to a hypercritical, overnice, and technical examination of the commitment, convert the writ of *habeas corpus* into a writ of error, and defeat the ends of justice."

Justices' courts have jurisdiction of certain public offenses committed within the several counties in which such courts are established, including "all misdemeanors punishable by fine not exceeding five hundred dollars, or imprisonment not exceeding six months, or by both such fine and imprisonment." (Pen. Code, sec. 1425.) The offense charged against the defendant came within this description. (Vehicle Act, sec. 32; Stats. 1917, p. 410.) It follows that the justice's court of Santa Ana Township had jurisdiction over the case here in question immediately upon the filing of the complaint, unless such jurisdiction was excluded by reason of the provisions of subdivision (c) hereinabove set forth.

Under the procedure generally applicable in criminal actions a defendant is not entitled to be released without bail upon his mere promise to appear for trial, nor will such release ordinarily be permitted by an arresting officer until it is so ordered by the court or magistrate. It was for the purpose of modifying this rule in a particular class of cases that said subdivision (c) of section 22 was enacted. It requires that the officer give the stated notice, and that if the defendant make a written promise to appear, "such officer shall forthwith release him from custody." This regulation has to do with the duties of an arresting officer and the right of the arrested person to immediate release upon com-



pliance with the stated conditions. If that right be disregarded and the defendant be compelled to submit to trial before five days have elapsed, he objecting thereto, then and then only does the procedure of the court conflict with the intent and purpose of the statute. But it would be straining the words of the statute so as to cover a purpose not intended if we should say in this proceeding that the judgment under which the petitioner stands committed is void on its face merely because that judgment does not affirmatively declare that the defendant upon his appearance before the justice of the peace on the day of his arrest waived his right to the five days' time provided by said statute, and does not affirmatively set forth that the said justice of the peace was the most accessible magistrate at the time of the arrest. The judgment does declare that after the arrest of the defendant, and on the same day, the defendant "appeared before this court and having been informed of all his legal rights, and the complaint in this action having been read to him, defendant pleaded guilty." It further appears by the return herein that the defendant perfected an appeal from said judgment to the superior court of Orange County; that the superior court rendered judgment of affirmance of the judgment and order of the justice's court; and this proceeding was instituted to prevent the enforcement of the judgment as so affirmed.

Attached to the sheriff's return in this proceeding there is an affidavit of John B. Cox, in response to which counter-affidavits have been filed on behalf of petitioner. It is not necessary for us to enter into an extended discussion of these affidavits. Their use in this proceeding or their consideration by the court is of doubtful propriety, considering the nature of this proceeding. The statements contained in the affidavits refer to the fact that the township of Tustin was nearer to the place of defendant's arrest than the township of Santa Ana; that certain conversations by telephone and otherwise took place between the justice and the defendant and the arresting officer. Presumably these facts, so far as they were at all admissible, were included in the statement on appeal to the superior court. They are not such matters as may be retried by affidavits in a proceeding like that now before this court. It has been held in this state that the denial of a trial by jury is merely error to be

corrected on appeal, and does not go to the jurisdiction of the court so that it may be inquired into on *habeas corpus*, except in those cases where a jury cannot be waived, and therefore is a necessary constituent part of the court. (*In re Fife*, 110 Cal. 8, [42 Pac. 299].) On the same principle we may say that the right to the five days' notice insisted upon by the defendant in the present proceeding and the alleged right to be taken before another justice were rights which could be waived; and that their denial by the justice's court (if they were denied) was merely error to be corrected on appeal, and does not go to the jurisdiction of the court, which alone may be inquired into in this proceeding.

It is ordered that the petitioner be remanded.

James, J., and Works, J., *pro tem.*, concurred.

---

[Civ. No. 2717. Second Appellate District.—June 22, 1918.]

COUNTY OF LOS ANGELES, Petitioner, v. JOHN C. CLINE, Sheriff, etc., Respondent.

PUBLIC OFFICERS—COMPENSATION OF SHERIFF OF LOS ANGELES COUNTY  
—DELIVERING PERSONS TO STATE INSTITUTIONS—COUNTY MONEY.—

The sheriff of the county of Los Angeles is not entitled to retain for his own use moneys received by him from the state, under sections 4175 and 4176 of the Political Code, for delivering prisoners and insane persons to state institutions, but he is required to turn the same into the county treasury, since the ordinance of the board of supervisors of such county fixing the compensation of such officer, passed under the power granted by the freeholders' charter of that county, is the measure of the right to compensation.

APPLICATION for a Writ of Mandamus originally made to the District Court of Appeal for the Second Appellate District to compel a sheriff to pay into the county treasury fees received by him from the state in delivering prisoners and insane persons to state institutions.

The facts are stated in the opinion of the court.

A. J. Hill, County Counsel, and David R. Faries, for Petitioner.

Frank Dominguez, George Sanders, Milton M. Cohen, and Gesner Williams, for Respondent.

SHAW, J.—In mandate. Respondent is sheriff of Los Angeles County, having been elected to said office at the general election in 1914. At the time of his election, and ever since, Los Angeles County has operated under a free-holders' charter, which provides that the board of supervisors shall by ordinance fix the compensation of all elective officers, which includes the sheriff. On June 2, 1913, said board, by an ordinance duly passed pursuant to the power so granted, fixed the salary of the sheriff of said county at the sum of four thousand dollars per year, which, as therein declared, was in full compensation for the performance of all official services required by law. The charter provided: "That all fees collected by any county officer, board or commission shall be paid into the county treasury on the first Monday of each calendar month, together with a detailed statement of the same in writing, a duplicate copy of which shall be filed with the auditor at the same time."

In the month of February, 1918, for services rendered by respondent as such sheriff covering the time necessarily consumed in delivering prisoners and insane persons to state institutions, he received from the state the sum of \$496. The question involved is whether or not respondent is, as he claims, entitled to retain said sum so received, for his own use, or required to turn the same into the county treasury and file therewith a detailed statement of the same in writing, and also file a duplicate copy thereof with the auditor. Respondent's refusal to comply with said provision of the charter is based upon sections 4175 and 4176 of the Political Code, which provide that there shall be allowed to the sheriff by the state, to be retained by him for his own use, a per diem of five dollars for the time necessarily consumed in delivering prisoners and insane persons to state institutions to which they have been legally committed. On the other hand, petitioner insists that the ordinance is the measure of respondent's right to compensation, and that, since the ordinance fixes his salary at four

thousand dollars per year in full compensation for his services and the charter requires all fees earned or collected by him for official services rendered to be turned into the county treasury; such fees so earned and received belong to the county.

In our opinion, petitioner's contention must be sustained. The charter, adopted under and pursuant to the provisions of section 7½, article XI, of the constitution, in express terms authorizes the board of supervisors by ordinance to fix the compensation of such sheriff, and under the power so granted the board did fix such salary, declaring it to be in full compensation for all services which the sheriff was required by law to perform, and, as declared by the charter, all fees received by him from any source for services which he was required to perform should be paid into the county treasury. Under the provisions of the constitution, charter, and ordinance, there would seem to be no question as to the county being entitled to the fees so received by the sheriff for the services rendered. Hence, while the sheriff is still entitled, under said sections 4175 and 4176, to collect from the state the per diem therein provided for his time consumed on behalf of the state in performing the duty imposed, the moneys so received belong to the county. Under the ordinance passed pursuant to charter provisions, the time of the sheriff consumed in the performance of his official duties belongs to the county, and his earnings in the performance thereof, like those of any other employee, belong to the employer. This conclusion finds ample support in cases decided by the courts of this state, among which are those of *Adams v. San Francisco*, 50 Cal. 117, *County of Santa Clara v. Branham*, 77 Cal. 592, [20 Pac. 75], *In the Matter of Dodge*, 135 Cal. 512, [67 Pac. 973], and *County of San Diego v. Schwartz*, 145 Cal. 49, [78 Pac. 231], all of which involved like questions and which were decided in accordance with the views herein expressed.

The alternative writ of mandate heretofore issued is made peremptory.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 19, 1918.

[Civ. No. 2349. First Appellate District.—June 22, 1918.]

**HOLLAND-MEISELL COMPANY** (a Corporation), Respondent, v. **J. A. KELLY**, Appellant.

**ACTION FOR GOODS SOLD—PURCHASE FROM AGENT—RIGHT TO SUE—ESTOPPEL.**—In an action on an account for goods sold by plaintiff as agent, the defendant is estopped from asserting that plaintiff had not the right to sue on the claim, where he bought with knowledge that by plaintiff's agency contract plaintiff guaranteed payment within a certain time, regardless of whether he received payment from the defendant or not.

**APPEAL** from a judgment of the Superior Court of Fresno County. H. Z. Austin, Judge.

The facts are stated in the opinion of the court.

U. Grant Hayden, for Appellant.

Short & Sutherland, and Carl E. Lindsay, for Respondent

**BEASLY, J., pro tem.**—The Holland-Meisell Company had judgment against Kelly for \$635.25 on October 1, 1917, from which Kelly appeals. The plaintiff was the agent of the Grand Lake Company, a paper manufacturing concern of the state of Maine, under an agreement—the terms of which were known to Kelly—by which the Holland-Meisell Company was held responsible for the solvency of all credit extended by it in the state of California upon sales of goods of the Grand Lake Company. By the terms of this contract the plaintiff guaranteed the payment of all accounts for goods of the Grand Lake Company sold by it within seventy-five days from the date of sale, and agreed to pay for all goods taken from consigned stock of the Grand Lake Company within seventy-five days whether or not it had received payment therefor from the customer. Kelly had been a member of the Holland-Meisell Company when this contract was entered into, and, as we have said, was familiar with the obligations of the Holland-Meisell Company to the Grand Lake Company under the contract. The complaint was upon an account for paper sold and delivered from stock in the possession of the plaintiff under its contract with the Grand

Lake Company. Kelly answered the complaint with a cross-complaint, in which he set up that the plaintiff was the agent of the Grand Lake Company in all the transactions set forth in the complaint, and that as such agent it had sold to him a carload of paper, which the Grand Lake Company had refused to deliver, to his damage in a sum considerably larger than the amount of the judgment afterward given against him.

The defense may be treated as an answer to the plaintiff's claim, upon the ground that the Holland-Meisell Company is not the true party in interest and that the action should have been begun in the name of the Grand Lake Company, and, upon the cross-complaint, as an assertion of a claim for damages to offset the demand sued upon.

Upon the first phase of the defense it may be said that as Kelly was thoroughly informed as to the obligations assumed by the Holland-Meisell Company upon the sale to him of the goods declared upon in the complaint, and knew that when that company sold him these goods it became obligated to the Grand Lake Company to pay for the same whether he paid the Holland-Meisell Company or not, he is clearly estopped from asserting that the plaintiff had not the right to sue him on this claim.

The carload sale was first discussed between Kelly and the plaintiff on or about the sixteenth day of November, 1915, and a verbal understanding seems to have been reached between them at that time that a carload of paper should be purchased by Kelly from the Grand Lake Company, to be delivered some time in February of the following year. The price of the carload was such that a verbal agreement to purchase the same, in the absence of delivery of a part thereof or part payment of the purchase price, would have been invalid under the statute of frauds. The trial court was, therefore, placed in the position where it was necessary for it to deduce the contract, if one was entered into, from the correspondence of the parties embraced in a great many letters which were introduced in evidence. It would be necessary, in order to understand the position in which the trial court was placed in construing these letters, to embrace practically the whole series in this opinion, and in the interest of brevity we do not feel justified in so doing. It seems sufficient for us to say on this point that, reading the

letters as a whole, it was evident that Mr. Kelly and Mr. Holland undertook to secure a carload of paper for Kelly from the Grand Lake Company for delivery in February at the price of the goods as it existed at the time of their conversation in November. This is shown sufficiently for present purposes by four or five quotations from letters that passed between the parties.

On November 15, 1915, Kelly wrote to the plaintiff cautioning it to be sure to protect him against the bag prices as they existed at that time. In answer to this letter the plaintiff informed Kelly: "We are placing with the Grand Lake Company a car of bags at present price, to be delivered to you in February." On December 2, 1915, the plaintiff again wrote to Kelly, saying: "The writer placed your order with the Grand Lake Company something over a week ago with the old price. I say old price because we received an advance of 10-5 per cent Monday. As to their acceptance we will advise you as soon as we get word if the car of bags are accepted by the Grand Lake Company," etc. On December 15, 1915, the plaintiff also wrote to the defendant saying that they did not believe there would be any question but that Kelly would be protected on the price, as the order was placed before the advance, and the Holland-Meisell Company did not see any chance of the Grand Lake Company repudiating it.

In the agreement between Holland and Kelly there had been no exact specification of the varieties of paper ordered by Kelly, and in response to a suggestion made by the plaintiff in a letter dated December 6, 1915, Kelly sent to the plaintiff a blanket order for a forty thousand pound car of grocers' bags. This order specified that Kelly confirmed the verbal order given to Holland on November 16th, and said that specifications for the car would follow in a week or so.

Practically this illustrates the character of the correspondence between these parties. The Holland-Meisell Company now contends that it had no authority to sell a carload of paper except subject to confirmation of the manufacturers, and that all they undertook to do was to order the goods from the Grand Lake Company subject to confirmation by the latter. It appears from the contract that carload orders were to be taken by the Holland-Meisell Company subject to credit regulations of the Grand Lake Company. We have

read all this correspondence with care, and are unable to say that the construction placed thereon by the trial court was not correct. It seems to us indeed that Mr. Holland, a former partner of Mr. Kelly, was endeavoring to secure for the latter a carload of paper at the prices as they existed in November, when the prices were gradually rising, and that Mr. Kelly, having found that the Holland-Meisell Company was unable to do this, laid the foundation for his cross-complaint in this action. Indeed, the verity of this view seems apparent from one of his letters to plaintiff, a portion of which is as follows: "It seems taking quite an unfair advantage of your firm, but it will put you in a much better shape to go to the Grand Lake Company and insist upon them filling this order when you can show them that we are withholding practically \$500 from your firm as a guarantee that you will live up to your contract. We, of course, expect that you will deduct this from your report to the Grand Lake Company so it will not seriously interfere with your own affairs." This last quotation seems to us conclusive as to the intention of the parties, and it does not appear to us that the plaintiff ever undertook to make to Kelly, or that he ever understood that it was making to him, an outright sale of the carload of goods, but rather that it was simply placing an order subject to confirmation by the Grand Lake Company.

The judgment is affirmed.

Kerrigan, J., and Zook, J., *pro tem.*, concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on July 22, 1918.



[Civ. No. 2025. First Appellate District.—June 24, 1918.]

**CITY OF OAKLAND (a Municipal Corporation), Respondent, v. EDSON F. ADAMS et al., Appellants.**

**EMINENT DOMAIN — DESCRIPTION OF LAND — PLEADING—REFERENCE TO DEED.**—In a proceeding in eminent domain by the city of Oakland to condemn defendants' property for a public park, a reference in the complaint to a deed from the Oakland Waterfront Company to the city of Oakland, which deed described the westerly line of the park lands as the easterly line of Rancho San Antonio, as finally determined and patented to V. and D. Peralta by the United States of America, between stations 131 and 134, and which described the easterly line of the Peralta grant of the San Antonio Rancho between the stations as the meandering line along the west shore of San Antonio Creek at the line of ordinary high water, had the same effect as if the description were incorporated in the complaint.

**ID.—DESCRIPTION OF LAND—UNCERTAINTY AS TO ONE BOUNDARY—REFERENCE TO INSTRUMENTS.**—In such a proceeding, where the complaint alleged that the tract sought to be condemned was the whole of an entire tract, and three boundaries thereof were described with certainty, except as to the length of two of them, the pleading sufficiently informed the defendants of the land the plaintiff sought to take, where the remaining boundary was described with reference to other instruments.

**ID.—EVIDENCE — TESTIMONY OF DEFENDANT — INTENTION IN ERECTING FENCE—QUESTION FOR JURY.**—In such a proceeding, the question of construction of the testimony of one of the defendants, who erected a fence on the property, as to whether it was his intention to thereby mark the boundary, was for the jury, and any knowledge gained by them in viewing the property was independent evidence, which they might take into consideration.

**ID.—LOCATION OF BOUNDARIES—DUTY OF COURT.**—In such a proceeding, the court should determine the boundaries of the land sought to be condemned and locate such boundaries upon the ground.

**ID.—FAILURE TO LOCATE BOUNDARIES — HARMLESS ERROR.**—In such a proceeding, where the jury found the boundary of the property to be at fence line, and the court adopted such finding, and the jury evidently based its verdict on such line, the failure to locate the boundaries on the ground was harmless error.

**ID.—DESCRIPTION OF PROPERTY — FAILURE OF PLAINTIFF TO INTRODUCE EVIDENCE—SUBSEQUENT PROOF BY DEFENDANTS—ERRONEOUS DENIAL OF NONSUIT HARMLESS ERROR.**—Where, in such a proceeding, the plaintiff rested its case without introducing any evidence to identify the land described in the complaint, and the sufficient instruments

were subsequently introduced by the defendants, and much evidence was taken as to the location of the boundary line, including the examination of the premises by the court and jury, there was no error, in view of section 4½ of article VI of the constitution, in denying a motion for nonsuit at close of plaintiff's testimony.

**ID.—APPEAL—IMPROPER QUESTIONS—FAILURE TO REQUEST ADMONITION TO DISREGARD—INSUFFICIENT GROUND FOR REVERSAL.**—In such a proceeding, it cannot be urged on appeal that certain questions asked of expert witnesses were injurious for the reason that they placed before the jury certain facts, where no request was made for an admonition to the jury to disregard the implications.

**ID.—LIMITATION OF CROSS-EXAMINATION OF EXPERT WITNESS—DISCRETION NOT ABUSED.**—In such a proceeding, it was not an abuse of discretion to refuse to permit an expert witness to answer questions on cross-examination as to the character of the property and its suitability for residence purposes, where the matter had already been gone into.

**ID.—VALUE OF LAND—PROPOSED USE BY CITY—IMPROPER ELEMENT.**—In such a proceeding, an objection to a question asked of one of defendants' expert witnesses whether in estimating value he considered the purpose for which the city was endeavoring to acquire the land was properly sustained.

**ID.—INTEREST OF WITNESS IN ADJACENT LAND—PROPER QUESTION.**—In such a proceeding, it was error to sustain an objection to a question asked of a real estate agent, who had estimated values for the city, as to whether he was interested in the sale of land that would be benefited by the park, but such error was harmless where the jury did not adopt his estimate of value.

**ID.—KNOWLEDGE OF GEOLOGY OF ESTUARY.**—In such a proceeding, where an expert witness testified that in fixing value of the property he took into consideration the depth of the mud and marsh portion of it and the cost of filling, there was no error in not permitting him to give an answer to the general question of his knowledge of the geology of the estuary in question.

**ID.—LOCATION OF BOUNDARY — DUTY OF DEFENDANTS — HARMLESS INSTRUCTION.**—In such a proceeding, the defendants were not harmed by an instruction that the duty to prove the location of the boundary line of the property rested upon the defendants, since the complaint sufficiently described the property, and the court and jury in hearing the evidence definitely found the boundaries.

**APPEAL** from a judgment of the Superior Court of Alameda County. T. W. Harris, Judge.

The facts are stated in the opinion of the court.

J. P. O'Brien, for Appellants.

Paul C. Morf, City Attorney, and John J. Earle, Deputy City Attorney, for Respondent.

BEASLY, J., *pro tem.*—In this eminent domain proceeding by which defendants' property was condemned by the city of Oakland for a public park, the judgment is attacked on this appeal by the defendants on the ground that the description of the property found in the complaint is insufficient. "The complaint," says appellants' counsel in his reply brief, "does not specifically describe the easterly boundary of this land, but it refers to a deed made by the Oakland Waterfront Company to the city of Oakland for such description. This deed fixes the easterly boundary as being the easterly line of the Rancho San Antonio as finally confirmed and patented to V. and D. Peralta between stations 131 and 134. . . . Nowhere in the patent are stations 131 or 134 or intervening stations mentioned or referred to." The reference to the Oakland Waterfront Company's deed to the city of Oakland as matter of description has the same effect as if the description were incorporated in the complaint. (*Vance v. Fore*, 24 Cal. 435.) This deed describes the westerly line of the park lands as the easterly line of Rancho San Antonio, as finally determined and patented to V. and D. Peralta by the United States of America, between stations 131 and 134; and the easterly line of the Peralta grant of the San Antonio Rancho between the stations mentioned was described in the patent as follows: "Thence meandering the west shore of San Antonio creek at the line of ordinary high water" to a station. Under the authority of *Oakland v. Oakland Waterfront Co.*, 118 Cal. 160, [50 Pac. 277], and *City of Oakland v. Wheeler*, 34 Cal. App. 442, [168 Pac. 23], this description must be held sufficient so far as the complaint is concerned.

It was further alleged in the complaint that the tract sought to be condemned was the whole of an entire tract, and three boundaries of this tract were admittedly described with certainty except as to the length of two of them. What may be called the two side-lines extending from the Fallon Street or western frontage of the property sought to be condemned to the easterly line thereof, which is the line in dis-

pute, were described as so many feet more or less in length; and this easterly boundary—which may be called an end-line of the tract for convenience—would have been left uncertain but for the references to the other deed and the patent, and the description of this line in the patent as the meander line of ordinary high tide of San Antonio Creek, which is a tide-water stream. But these references, taken with the allegation that the tract as a whole was to be condemned, were sufficient in the complaint to inform the defendants accurately of the land the plaintiff sought to take.

As contended in the case of *City of Oakland v. Wheeler*, *supra*, so here it is claimed that the line could not be located on the ground. The force of this objection is weakened by the fact that the city sought to condemn the whole of defendants' tract, and that they themselves, as one of them testified, knew their land extended to the Peralta line, and had always paid taxes on and claimed all the land to the Peralta line. As in the case of *City of Oakland v. Wheeler*, so here, certain engineers testified that the line of the land could not be located on the ground by the description; but the court and jury visited and inspected the premises. What they found or saw does not appear in the record. There was some evidence as to the location of this tide line upon the ground. There was also a fence on the property erected by the defendant, Edson F. Adams, which the jury found in a special verdict, in answer to a question submitted to them, was the Peralta line, and this Peralta line, as we have seen, was the line of ordinary high tide. It does not appear that the jury may not have been able to determine for themselves upon an inspection of the property that this fence was erected upon this line, the natural place for a fence marking the boundary of a man's property to be. It is true that Mr. Adams testified that he did not erect the fence for this purpose, and gave various reasons which, it is claimed, show that he did not erect it with the intention of placing it upon the boundary of the defendant's property; but the question of the construction of this testimony and what they saw when they visited the premises, and of the weight and construction of other testimony on this subject, was for the jury. It is well settled in this state that knowledge gained by the court from a view of the premises is independent evidence, to be taken into consideration in

determining the issues of the case. (*People v. Milner*, 122 Cal. 171, [54 Pac. 833]; *Hatton v. Gregg*, 4 Cal. App. 537, [88 Pac. 592].)

"If a finding of fact is based upon a reasonable inference, it is not within the power of this court to set it aside any more than it is within its power to set aside any other finding supported by sufficient legal evidence, for a finding of fact based upon reasonable inferences drawn from facts proved with legal sufficiency is as much and as completely as any other finding of fact a finding based upon good and sufficient evidence." (*Ryder v. Bamberger*, 172 Cal. 791, [158 Pac. 753].) If the court and jury discredited Mr. Adams' explanation as to this fence, and found evidences upon the ground which indicated that the fence was actually placed upon the high-tide line, their finding in that respect cannot be here reviewed; and it may be added that the jury found this fence line to be the Peralta grant line, and that the court, in findings made up by it, adopted this finding of the jury.

The appellants contend that the court and not the jury should have determined the boundaries of the land sought to be condemned and have located these boundaries upon the ground. While it may be said that the court should have done this under well-settled authorities in this state (*Vallejo etc. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, [147 Pac. 238]; *City of Oakland v. Pacific Coast Lumber Co.*, 171 Cal. 392, [153 Pac. 705]; *San Joaquin Irr. Co. v. Stevenson*, 26 Cal. App. 274, [147 Pac. 254]), nevertheless, as the jury found the boundary to be at the fence line, and as the court subsequently adopted that finding as a fact, and as the jury evidently based its verdict for damages done to the defendants upon that line, no harm can possibly have come to the defendants by reason of the court not following the course which the defendants insist it should have pursued in settling the location of the boundary. The question of the sufficiency of this description was raised in many ways during the trial, but all these objections are answered by the foregoing considerations.

At the close of plaintiff's testimony the defendants made a motion for a nonsuit. The plaintiff had rested its case without introducing any evidence whatever to identify the land described in the complaint. It may be conceded, al-

though we do not so decide on this record, that the plaintiff should have introduced in evidence the deed of the Oakland Waterfront Company to the city of Oakland, and the Peralta grant from the United States government heretofore referred to, at least before resting its case; but these instruments were subsequently offered in evidence by the defendants, and much evidence was taken as to the location of the boundary line, including the examination of the premises by the court and jury. We have examined this entire record with care, and it seems to us that, conceding that the defendants' motion for a nonsuit should have been granted, nevertheless this case comes squarely within section 4½ of article VI of the constitution, providing that no judgment shall be set aside in any case for any error as to any matter of procedure unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. An examination of the record here fails to indicate that sufficient damages were not awarded by the jury to the defendants, nor does it appear from an examination of the entire cause, including the evidence, that there has been in any other respect a miscarriage of justice. It seems to us that even conceding defendants' position as to the error of the court in denying their motion for a nonsuit, this is on that point a proper case for the application of the constitutional provision.

The appellants' next ground for reversal is that their objection to a question asked on cross-examination of one of their expert witnesses as to the value of the land was improperly overruled. The question was whether or not the witness' opinion of the value of the property would be affected if it were shown that six acres of property situate in the neighborhood of the property sought to be condemned had been sold on December 4, 1905, to the city of Oakland by the defendants for the sum of fifteen thousand dollars. The witness answered, "No." Of course, this answer could not have injured defendants; but the defendants complain that the question itself was injurious to them in that by means thereof the city attorney got before the jury the fact that they had sold to the city of Oakland a similar piece of property for a much lower price than that claimed by them for the property sought to be taken in this proceeding. The

answer to this is that the court was not asked to admonish the jury to disregard the implication of the question.

Another similar question objected to by the defendants was whether, if it should be shown to the witness that the property was assessed by the assessor of the city of Oakland at the sum of five thousand five hundred dollars, that would affect his estimate of value. The witness answered that it would not, and added to his answer an explicit and lengthy statement of the reasons supporting his opinion as to the market value of the land.

Again, the defendants complain that the question was an attempt to get before the jury evidence of what the property had been assessed for by the city of Oakland, and thus to prejudice their judgment as to its value. But as with the former question the defendants did not ask the court to instruct the jury to disregard the insinuation contained therein, and cannot now complain of the effect that may have been produced upon the jury thereby.

Mr. Woodward, one of plaintiff's witnesses, was asked if it was not a fact that certain property in the neighborhood of the property sought to be condemned was marsh-land and all built in and improved with residences and business property, and the further question if it was not a fact that substantial residences existed on marsh-land filled in on Harrison Street. Objections to these questions were sustained by the court. Mr. Woodward had testified in chief that in estimating the value of the land sought to be condemned he had taken into consideration the character of the land; and that his objection to the property for residence purposes was not only that it could not be sewered by gravity, but also because it was generally undesirable for residential purposes, as it was marsh and low land. This would indicate that these questions should have been answered. But this witness had been examined at great length, and the court undoubtedly, in passing upon this question, as appears from a colloquy between the judge and the defendants' counsel, was attempting to exercise its discretion in limiting the cross-examination of the witness within reasonable bounds. The record in this case is a bill of exceptions; questions and answers do not always appear therein, and much of the evidence of this witness on cross-examination, found in the record in narrative form, indicates that the witness may have

been asked similar questions previously which were permitted to be answered; and we cannot say from this record that the trial court abused its discretion when it refused upon this ground to permit these questions to be answered. Further, it may be said that it was the duty of counsel to point out to the court, in a lengthy trial such as this, and upon a ruling based, as this was, upon a desire to limit the examination, the fact—if it was a fact—that the question which counsel sought to have answered had not been previously asked. This is especially true in view of the fact that the court, in sustaining the objection, said: "I think we went over this ground practically the other day. It is a matter of repetition."

It is contended that three witnesses, called by the plaintiff in rebuttal upon the question of value, were asked to give their opinions of the value of certain land which is essentially different from that described in the complaint. It is sufficient in answer to this, without reciting these very long questions in this opinion, to say that the city attorney evidently attempted in the question to ask as to the value of the property as bounded on the easterly side by the fence which was afterward found by the jury and by the court to be the easterly boundary line of the property sought to be condemned; but whether counsel succeeded in doing this or not he did ask the value of a part of the property less in extent than that described in the complaint, and also less than that described in the judgment in the case. This he had a perfect right to do. It may be added that the question was asked at a time when the boundary of the property had not been definitely settled, nor had the court been asked up to that time to definitely settle this boundary. Counsel were trying the case upon the theory evidently that the jury was to settle the location of this boundary line. That being so, the questions of counsel must necessarily have been somewhat indefinite as to the boundaries of the property, and no substantial right of the defendants seems to have been transgressed by the answer to this question.

The court, it is claimed, erred in sustaining plaintiff's objection to the following question asked of one of defendants' witnesses on cross-examination: "When you made your estimate upon the value of this property did you consider as a basis of your estimate the purposes for which the city was



endeavoring to acquire it?" There is a fundamental distinction between the question asked in the case of *Spring Valley Water Works v. Drinkhouse*, 92 Cal. 528, [28 Pac. 681], upon which counsel rely, and the question above quoted. It was shown in the case mentioned that the land was valuable for reservoir purposes; and, of course, its value for reservoir purposes should have been taken into consideration (as was there held) by the jury in fixing the value of the property. But here it does not appear that this particular property had any distinct value for park purposes over any other property that might have been acquired by the city of Oakland; at least we find nothing in the record indicating that it had such distinctive value. It does not seem that the fact that the city intended to acquire this property and use it for park purposes should cause it to be penalized, or that the increment in value which might attach to it because of the fact that the city desired to acquire it to convert it into a city park should raise its value to the city for that purpose. We think the objection was properly sustained. Indeed, it appears from this record that this property could only be made suitable for park purposes by an expenditure of a great deal of money on it. We think the value to be placed on property situated as this was should not be raised because the city was endeavoring to acquire it for the purpose of a public park.

A. J. Snyder, a real estate agent who had estimated the value of the property for the plaintiff, was asked if he was interested in the sale of land that would be benefited if the land sought to be condemned was acquired for park purposes. An objection to this question was sustained. This objection should have been overruled, as its answer, if in the affirmative, would have shown an interest on the part of Snyder in the acquisition by the city of this property for park purposes; but in view of the fact that the jury did not adopt Snyder's estimates, but, on the contrary, gave a verdict several thousand dollars higher in amount than the estimate placed by Snyder upon the property, we do not feel inclined to reverse this case because of this error.

The question, "Are you acquainted with the geology of the estuary in that locality?" asked by the defendants of one of plaintiff's witnesses on cross-examination, was too general in its nature. The witness had stated that in fixing the value

of the property he had taken into consideration the depth of the mud or marsh upon portions of it, and that the value of the property depended upon the depth of the mud and the cost of filling the land. He also testified that he did not know what the depth of the mud was, but had assumed in making his estimate of value that the mud was fifteen to twenty feet deep. There was no error in not permitting him to give an answer to the general question of his knowledge of the geology of the estuary, in view of the testimony which he had given. If counsel wished to know more about the depth of the mud and the condition of the marsh, he should have directed his questions specifically to those factors of the situation, and should not have asked a general question such as the one propounded here.

After reciting considerable testimony concerning the value of the property, defendants' counsel contends that the character of this testimony was such that it fell far short of the legal measure of sufficiency which the law requires to sustain a judgment; but an examination of the record shows ample testimony of value to sustain the judgment in this case.

We do not think that the instruction to the jury that the duty to prove the location of the Peralta line rested upon the defendants falls within the rule laid down in the case of *Aliso Water Co. v. Baker*, 95 Cal. 268, [30 Pac. 537]. The question in that case was the certainty of the description of certain water rights to be condemned. The description of the water rights in the complaint was held uncertain in not showing definitely what water rights were proposed to be condemned. The case arose on a demurrer for uncertainty to a complaint to condemn certain rights to the water of Sycamore Creek, but neither the quantity of the water sought to be condemned nor the rights thereto which the plaintiff undertook to take from the owners by the proceeding were definitely set out. In this case the complaint does, as we hold, sufficiently describe the property to be taken. The court and jury on hearing the evidence definitely found the boundaries of the property. Conceding that the instruction was in the abstract an improper one, nevertheless we cannot see that the defendants were prejudiced in any substantial right thereby.

These considerations, at the expense of much space, seem to us to dispose of this case.

The judgment is affirmed.

Kerrigan, J., and Zook, J., *pro tem.*, concurred.

[Civ. No. 1811. Third Appellate District.—June 24, 1918.]

**IMORY SMITH POLK, Appellant, v. LAUREL HILL CEMETERY ASSOCIATION (a Corporation), Respondent.**

**NEGLIGENCE—DROWNING OF CHILD IN CEMETERY RESERVOIR—PLEADING—RIGHTS OF LOT OWNERS AND PUBLIC—SURPLUSAGE.**—In an action to recover damages for the death of child by drowning in a reservoir maintained by defendant in its cemetery, where children were permitted freely and without hindrance to go and come, allegations as to the rights of lot owners and visitors, and as to the right of the public to use a certain roadway for the purpose of passing through the cemetery, were surplusage.

**Id.—EXCAVATION ADJOINING HIGHWAY—INSUFFICIENT ALLEGATION.**—In such an action, an allegation in the complaint that in a prominent place in the cemetery and “immediately alongside” one of the drive-ways therein, and only a short distance from a certain entrance to the cemetery, the defendant dug, excavated, and constructed and still maintains in a prominent place a large reservoir for the holding of water, does not bring the case within the class where an excavation has been dug or maintained “adjoining a highway” into which a traveler on the highway, where he had the right to be, had accidentally fallen.

**Id.—RULE OF TURNABLE CASES.**—Where dangerous and attractive machinery is maintained unguarded and exposed to the observation and temptation of little children, the natural allurements of which will tempt them to go about or upon, and against the danger of which action their immature judgment interposes no warning or defense, the conduct of the party in so maintaining such machinery involves an act of negligence for which he is liable in damages where a child of the above description, having gone upon or played about and with the machinery, is thereby injured, notwithstanding that the child so injured is a trespasser upon the land upon which the machinery is maintained.

**Id.—QUALIFICATION OF RULE.**—The rule is to be understood with the qualification that the dangers of the machinery, although novel and

attractive to the immature mind of a child, can be fully or sufficiently guarded to protect against injury without destroying its usefulness for the purpose for which it is maintained.

**ID.—GENERAL INVITATION TO VISIT CEMETERY—RIGHT OF CHILDREN TO USE AS PLAYGROUND NOT INCLUDED.**—A permissive general invitation to visit a cemetery, not abandoned, but parked and having driveways, does not include the granting of a privilege to children to make a playground of the place.

**ID.—KNOWLEDGE OF USE OF CEMETERY AS PLAYGROUND—LICENSEES.**—Mere knowledge by a cemetery association that children habitually went into the cemetery and therein indulged in their childish sports would make the children at most mere licensees, to whom the association owed no duty or obligation.

**ID.—NONLIABILITY UNDER RULE OF TURNABLE CASES.**—A cemetery association maintaining an unguarded reservoir alongside a driveway near an entrance to the cemetery is not liable, under the rule of the turntable cases, for the drowning of a child of the age of eight years.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. Geo. A. Sturtevant, Judge.

The facts are stated in the opinion of the court.

John L. McNab, for Appellant.

Haven & Athearn, for Respondent.

**HART, J.**—Plaintiff brought the action to recover damages for the death of his son by drowning in a reservoir maintained by defendant in its cemetery in the city of San Francisco. A demurrer to the complaint was sustained, plaintiff elected not to amend, and judgment was entered in favor of defendant for costs, from which judgment plaintiff appeals.

The complaint alleges that defendant is a corporation; that, at the time of his death, William Henry Polk was a minor of the age of eight years and was the son of plaintiff; that defendant, for many years, has maintained in San Francisco a public cemetery; the streets surrounding it are named and it is stated that they are public thoroughfares used by the general public and by minor children attending public schools; that, for many years, said cemetery has been abandoned as a burial place owing to an ordinance of the city

forbidding burials therein, but that it "has been and is now maintained as a place of adornment and attraction, parked and graded and kept open to the public daily from the hour of 7 A. M. until 5 P. M. of each day. Said cemetery is located in the heart of the residence section of the city and county of San Francisco, is surrounded by dwellings, and is maintained as an open parked ground made attractive not only for the benefit of persons whose relations and friends are buried within said cemetery, but is maintained as a public place of adornment and beauty with driveways, flower gardens," etc., "maintained open for the public view." The gates, entrances, and driveways are then described, and it is alleged that the cemetery is "daily frequented by great numbers of the general public, by visitors, . . . and particularly by great numbers of minor children who were and are permitted freely and without hindrance to enter said grounds and make a playground thereof, . . . to traverse its paths and byways, play in its driveways, and go and come freely throughout the whole of said cemetery." It is then stated that rules for the government of the public are posted in a prominent place at the entrance, to the effect that visitors should conduct themselves with proper decorum, forbid the plucking of flowers, etc.; that the owners of lots in said cemetery have the right freely to enter and do work in the way of erecting curbs, improving and adorning graves, etc.; that the cemetery contains many hundreds of individual lots, owned by the purchasers thereof, and that all the ground has been sold to individual lot owners; that for many years the general public used a roadway through said cemetery, including children going from what is known as the Richmond District to car lines at Presidio Avenue; that there is a turnstile in said roadway in the boundary fence and over said turnstile are signs reading: "Open from 7 A. M. to 5 P. M." It is next alleged: "At a prominent place in said cemetery and immediately alongside one of the driveways therein and only a short distance from the Presidio Avenue entrance aforesaid defendant dug, excavated, and constructed a large reservoir for the holding of water; said reservoir is still maintained on said premises and is of the length of about 130 feet, by a width of fifty-five feet, and was of a depth of sixteen feet; said reservoir is constructed of concrete and rises only twelve inches above the surface of the

ground, which is parked and sloped up to the edge of said concrete"; that said reservoir was wholly exposed without covering and without any fence or inclosure; that it was dangerous to all persons passing near the same "because the turf and ground sloped up to the edge thereof, so that any person walking or standing near the edge of said reservoir was without protection and without notice of proximity to a place of danger and was without any warning sign or indication that said place was dangerous. . . . Said reservoir was also likewise a place naturally attractive to children, and the children entering said grounds were naturally attracted on account of the water therein, and were accustomed naturally to play about said reservoir, casting stones into it, and imitating fishermen by casting lines therein and playing on the turf near the edge thereof. Said reservoir was at times filled with water almost to the brim and at other times was almost empty. . . . On the twenty-fifth day of April, 1914, William Henry Polk, the son of the plaintiff, a child of eight years of age, in company with other small minor children, entered said grounds at the driveway entrance on Presidio Avenue above referred to about 2 P. M. of said day and engaged in playing in said grounds with other children, and in the same way that great numbers of children had been accustomed for years to enter and play in said cemetery with the knowledge of defendant. While engaged in such play near said reservoir said infant stumbled and was precipitated into said reservoir and drowned, and was dead when removed from said reservoir a few minutes later. Plaintiff alleges that said child came to his death through the negligence of the defendant in constructing and maintaining such reservoir without any protecting barrier," etc., and "without any warning sign or guard to protect against the danger thereof. . . . Defendant at all the times herein mentioned well knew that said reservoir was attractive to children and was dangerous, and was well aware of the fact that any child or other person approaching or being near said reservoir was without protection or notice of danger and was in imminent danger of falling into said reservoir," and it is alleged, on information and belief, that prior to April 25, 1914, defendant, its agents and employees, had been personally notified that said reservoir was a dangerous place and a place attractive to children.

Counsel for the defendant, in their brief, analyze and construe the averments of the complaint as follows:

"The facts (alleged in the complaint) may be classified as follows:

"1. Facts relating to lot owners and visitors to graves located in defendants' cemetery.

"2. Facts relating to the right of the public to use a certain roadway for the purpose of passing through said cemetery.

"3. Facts relating to children playing in said cemetery.

"Under the first class of facts fall the allegations of paragraph IV that the cemetery was kept open from the hours of 7 A. M. until 5 P. M., and was maintained not only for the benefit of persons whose relatives and friends were buried within said cemetery, but also as a place of public adornment and beauty.

"To this class of facts likewise belong the allegations concerning the rules of the cemetery which were clearly posted to govern only the conduct of those who were invited to enter the cemetery, and the allegations concerning the rights of lot owners.

"Under the second class of facts fall the allegations concerning the use by the public of a certain roadway for the purpose of passing through said cemetery between Presidio avenue and the Richmond District."

We are satisfied with the foregoing analysis of the complaint, and agree with the conclusion declared by counsel for the respondent that the facts coming within the first and second classes, as above indicated, are surplusage. We, therefore, accept and adopt into this opinion the above analysis of the complaint. We do this, not because we believe that the facts embraced within the first and second classes, as above classified, even if properly in the complaint, would add any force or strength to the case as made by the allegations as to the cause of the accidental death of plaintiff's son, but because it will clarify the situation and confine the discussion herein to the single real question submitted by this appeal, viz.: Whether the defendant owed any duty to the deceased with respect to safeguarding, if it could be done, the reservoir into which he fell.

It may, however, be well first to note that, while the complaint alleges that "in a prominent place in said cemetery

and immediately *alongside* one of the driveways therein and only a short distance from the Presidio Avenue entrance aforesaid defendant dug, excavated, and constructed" and still maintains "in a prominent place a large reservoir for the holding of water," it is not alleged that said reservoir abutted upon or in any manner affected Presidio Avenue or the driveway near which it is maintained. Hence, the case as made by the complaint does not fall within that class where an excavation has been dug or maintained "adjoining a highway into which a traveler on the highway, where he had the right to be, had accidentally fallen." (*Peters v. Bowman*, 115 Cal. 345, 349, [56 Am. St. Rep. 106, 47 Pac. 113].) Nor does it come within the class of cases which constitute exceptions to the general rule as to the liability of an owner of property to a trespasser thereon who has been injured through some trap or hidden or concealed danger maintained by the owner on his land, and as to which the latter has given no warning to the public or others.

But it is vigorously urged that the case here comes within the doctrine of what are known as the turntable cases.

The rule of the so-called "turntable cases," generally stated, is this: That, where dangerous and attractive machinery is maintained unguarded and exposed to the observation and temptation of little children, the natural allurements of which will tempt them to go about or upon, and against the danger of which action their immature judgment interposes no warning or defense, the conduct of the party in so maintaining such machinery involves an act of negligence for which he is liable in damages where a child of the above description, having gone upon or played about and with the machinery, is thereby injured, notwithstanding that the child so injured is a trespasser upon the land upon which the machinery is maintained. This rule is, of course, to be understood with the qualification that the dangers of the machinery, although novel and attractive to the immature mind of a child, can be fully or sufficiently guarded to protect against injury without destroying its usefulness for the purpose for which it is maintained. The principle from which the doctrine of the turntable cases is deduced or upon which it is supported is spoken through the maxim of the law that "one must so use and enjoy his property as to interfere with the comfort and safety of others as little as possible, con-



sistently with its proper use." (*Barrett v. Southern Pac. Co.*, 91 Cal. 296, 303, [25 Am. St. Rep. 186, 27 Pac. 666].) The court, in that case, said:

"If defendant ought reasonably to have anticipated that leaving this turntable unguarded and exposed an injury such as plaintiff suffered was likely to occur, then it must be held to have anticipated it, and was guilty of negligence in thus maintaining it in its exposed position. It is no answer to this to say that the child was a trespasser, and if it had not intermeddled with defendant's property, it would not have been hurt, and that the law imposes no duty upon the defendant to make its premises a safe playing-ground for children.

"In the forum of law, as well as of common sense, a child of immature years is expected to exercise only such care and self-restraint as belongs to childhood, and a reasonable man must be presumed to know this, and required to govern his actions accordingly. It is a matter of common experience that children of tender years are guided in their actions by childish instincts, and are lacking in that discretion which is ordinarily sufficient to enable those of more mature years to appreciate and avoid danger, and in proportion to this lack of judgment on their part, the care which must be observed toward them by others is increased."

We may, however, here pause to inquire whether the plaintiff's son was in the cemetery at the time of his death under the general invitation extended by the defendant to the public to visit the cemetery.

While the complaint declares that the defendant's cemetery, for a number of years prior to the accidental death of plaintiff's son, had been abandoned as a burial place for the dead and that since that time said cemetery "has been and is now maintained as a place of adornment and attraction, parked and graded and kept open to the public daily from 7 A. M. to 5 P. M.," yet it is likewise shown that there are still buried in said cemetery many dead human bodies which had been deposited in graves therein before the cemetery had been abandoned as such, and that said graves are still maintained and cared for by surviving relatives and friends of the deceased. It is, therefore, quite manifest that the said cemetery is not now, nor has it been since its abandonment as such, any the less a cemetery, notwithstanding that it has

been maintained in a manner to give it the appearance of a park. In other words, it has not been converted into a public park, in the sense in which such places of amusement and diversion are commonly known, and much less into a children's playground, merely because further burials therein have been stopped under the mandates of ordinances of the city of San Francisco prohibiting burials therein. The invitation to the public to visit the cemetery must, therefore, be assumed to be accompanied by the condition that persons accepting or acting upon it will do so with due regard to the fact that a place, such as it is, which is dedicated to the dead, as the resting place of the mortal remains of those who have passed to the beyond, is not one of recreation and pleasure, where the lighter vein of life may with propriety be given full play, but is one which, obediently to the common sentiments of mankind, demands of those who visit it dignity of demeanor and respect and that serious reflection that the one great event, which is inevitably common to all living creatures, and of which a place in which the dead have been buried is a most potent reminder, would naturally inspire. Hence, it must be said, on the complaint's description of the place where appellant's son lost his life, that the invitation extended to the public by the owner of the cemetery (the defendant) to visit the same during certain specified hours of each day is limited to those of the public that go or desire to go there for a purpose other than for those lighter pleasures which are intended and calculated to divert the mind from the more serious affairs of life, and even for the time from that final inevitable destiny which marks the end of all human life. Of course, it cannot be doubted that children are within the scope of the invitation, but it certainly cannot reasonably be said that the invitation included the granting of a privilege to children to make a playground of the place. No one would contend that under the invitation children are privileged to play on the graves; and, although it had been the custom of children residing in the neighborhood of the cemetery to go to the cemetery and play therein, there is nothing in the complaint to show that they had been either directly or impliedly given the right to do so. When, therefore, they were in the cemetery for the purpose of playing only, they were not there for any purpose to which the cemetery is put or designed to be put, nor were they there under

the general privilege accorded or general invitation extended to the public to visit the cemetery. "The invitation which creates a legal duty," says the court, in *Mandeville Mills v. Dale*, 2 Ga. App. 607, [58 S. E. 1060], "may be express or implied, as when such owner or occupier by acts or conduct leads another to believe the land or something thereon was intended to be used as he uses them and that such use is not only acquiesced in by the owner or occupier, *but is in accordance with the intention or design for which the way or place or thing was adopted and prepared, or allowed to be used.*" (Italics ours. See, also, Words and Phrases, second series, under word, "Invitation," and the cases therein cited.)

It is true that the complaint discloses that the defendant by its agents and officers had knowledge of the fact that children were accustomed to playing in the cemetery, and that they were permitted by the defendant, its agents, etc., to go in and upon the paths and byways of the cemetery to play therein and thereon. But mere knowledge by the defendant that children habitually went into the cemetery and therein indulged in their childish sports would make them, at the most, mere licensees, to whom the defendant owed no duty or obligation. (*Means v. Southern California Ry. Co.*, 144 Cal. 473, 478, 479, [1 Ann. Cas. 206, 77 Pac. 1001]; *Kennedy v. Chase*, 119 Cal. 642, [63 Am. St. Rep. 153, 52 Pac. 33]; *Grundel v. Union Iron Works*, 141 Cal. 564, [75 Pac. 184]; *Herzog v. Hemphill*, 7 Cal. App. 118, [93 Pac. 899]; *Schmidt v. Bauer*, 80 Cal. 567, [5 L. R. A. 580, 22 Pac. 256].)

Mr. Thompson, in his treatise on Negligence, section 303, says: "We have found no support for any rule which would protect those who go where they are not invited, but merely with express or tacit permission, from curiosity or motives of private convenience, in no way connected with business or their relations with the occupant."

In the *Means* case, *supra*, the plaintiff was injured while in the freight-shed of the defendant by the bursting of a tank of sulphuric acid situated in said shed. The plaintiff had gone into the freight-shed to see a party in connection with some matter personal to himself. His action for damages was defeated in the trial court, a motion for a nonsuit having been granted, and the judgment thereupon entered affirmed on appeal. The supreme court, referring to the

facts, said: "If the plaintiff was not technically a trespasser in entering the freight-house of the defendant, he was at best but a licensee, entering thereon subject to the rule determining the measure of responsibility of the owner of premises to a mere licensee. He was not upon the premises by the invitation, express or implied, of the defendant, nor for any business purpose connected with defendant, nor in relation to any business for which the freight-house, in which he was injured, was used. He went there of his own volition, uninvited, concerning a matter which was personal to himself, in which the defendant had no interest."

The foregoing observations have peculiarly pertinent application to the facts of this case. As we have shown, the complaint discloses that the appellant's son went to the cemetery on the day of his unfortunate death for the purpose of gratifying his childish desires and fancies, and was there in connection with a matter in no way germane to the business of the defendant or the purpose for which it maintains the cemetery, or the purpose for which it extends to the public an invitation to visit the cemetery.

It follows from the foregoing considerations that if the appellant is entitled, upon the facts stated in his complaint, to prevail herein, he must show that the said facts bring the case within the rule of the turntable cases. This he has failed to do, as we will now proceed to show.

We have previously stated the principle of law and the reasons supporting the rule applied in cases of injury sustained by trespassing children of immature judgment in playing on and about dangerous machinery to which they have been allured by the peculiar natural attractiveness thereof to childish minds. We may here further say upon that subject that, while the rule is applicable in all cases of attractive machinery in playing with which children have been injured, the leading cases have particularly to do with turntables, which, as is commonly known, are contrivances maintained by railroad companies at certain of their stations for the purpose of turning engines and cars in directions in which the exigencies or requirements of their traffic compel them to go. And those cases, in portraying the natural attractiveness of turntables to infant minds, have described them, as they naturally would appear to the mind of a child, as a sort of "merry-go-round," a contrivance, which, as is

equally well known, is maintained for the amusement of children and which always, very naturally, arouses to a high pitch their childish predilection for sport and fun. Naturally enough, then, a child would readily be tempted to attempt to play and ride on turntables, machines of lurking and unobservable danger to a child, and hence the rule that the person maintaining them must so safeguard them (as by locking them when not in use so that they cannot be turned) as will, in a large measure, protect children playing on or about them against injury. The case here, however, presents an entirely different situation. A pond of water, it may be conceded, is always attractive to youngsters, but the dangers connected with and inherent in a lake or pond of water, natural or artificial, are obvious to everybody—even to a child old enough to be permitted by its parents to go about and play unattended upon the streets or in the public parks. It would not conform to the dictates of common reason to say that a child of the age of eight years, or even much younger, does not know and fully realize that a fall into a pond of water or a deep reservoir would result in injury to him, if not in his death. But there is no necessity for abstract reasoning upon the proposition, for we think it thoroughly settled by the decisions that a pond of water, whether natural or artificial, is not to be included in the same class with turntables and other complicated machinery the inherent dangers of which are not obvious to a child.

In *Peters v. Bowman*, 115 Cal. 345, [56 Am. St. Rep. 106, 47 Pac. 113, 598], a pond of water had formed on defendant's land from surface water gathering thereon in certain seasons of the year as the result of the grading of a street upon which the land abutted and so closing a gully through which said surface water had theretofore been accustomed to flow and pass from the land. The plaintiff's son, aged eleven years, while riding a raft on the pond, fell off and into the water and was drowned. Judgment upon the verdict of the jury went for the defendant and plaintiff appealed from the judgment and the order. Among other things, the court therein said, referring to the turntable doctrine, which the plaintiff in that case undertook to invoke:

"But the rule of the turntable cases is an exception to the general principle that the owner of land is under no legal duty to keep it in a safe condition for others than those

whom he invites there, and that trespassers take the risk of injuries from ordinary *visible* causes; and it should not be carried beyond the class of cases to which it has been applied. And the cases to which the rule has been applied, so far as our attention has been called to them, are nearly all cases where the owner of the land had erected on it *dangerous machinery*, the consequences of meddling with which are not supposed to be comprehended by infant minds. It has often been applied to a few other cases where the owner, by some affirmative act, has caused some artificial danger to exist on his premises, as in *Branson v. Labrot*, 81 Ky. 638, [50 Am. Rep. 193], cited by appellant, where defendants had 'stacked a large quantity of lumber in one large and irregular pile so negligently and badly done that as the deceased, an infant, was playing near it, one of the timbers fell upon and killed him.' It is not contended by appellant that the rule of the turntable cases has ever been applied to facts like those in the case at bar; his contention is that the reasoning and philosophy of the rule *ought* to extend it to a case like the one at bar. But the same reasoning does not apply to both sets of cases. A body of water—either standing, as in ponds and lakes, or running, as in rivers and creeks, or ebbing and flowing, as on the shores of seas and bays—is a natural object incident to all countries which are not deserts. Such a body of water may be found in or close to nearly every city or town in the land; the danger of drowning in it is *an apparent open danger, the knowledge of which is common to all* (italics ours); and there is no just view consistent with recognized rights of property owners which would compel one owning land upon which such water, or part of it, stands and flows, to fill it up, or surround it with an impenetrable wall. . . . No case has been cited where damages have been successfully recovered for the death of a child drowned in a pond on private premises who had come there without invitation, while it has been repeatedly held that in such case no damages can be recovered. It was so held in *Klix v. Nieman*, 68 Wis. 271, [60 Am. Rep. 854, 32 N. W. 223], in *Overholt v. Vieths*, 93 Mo. 422, [3 Am. St. Rep. 557, 6 S. W. 74], in *Hargreaves v. Deacon*, 25 Mich. 1, in *Gillespie v. McGowan*, 100 Pa. St. 144, [45 Am. Rep. 365], and in the recent case of *Richards v. Connell*, 45 Neb. 467, [63 N. W. 915]."

In denying a petition for a rehearing of *Peters v. Bowman*, the late Chief Justice Beatty said, among other things: "A turntable can be rendered absolutely safe, without destroying or materially impairing its usefulness, by simply locking it. A pond cannot be rendered inaccessible to boys by any ordinary means. Certainly no ordinary fence around the lot upon which a pond is situated would answer the purpose; and, therefore, to make it safe, it must either be filled or drained, or, in other words, destroyed. But ponds are always useful, and often necessary, and where they do not exist naturally, must be created in order to store water for stock and for domestic purposes, irrigation, etc. Are we to hold that every owner of a pond or reservoir is liable in damages for any child that comes uninvited upon his premises and happens to fall in the water and drown? If so, then upon the same principle must the owner of a fruit tree be held liable for the death or injury of a child who, attracted by the fruit, climbs into the branches and falls out. But this, we imagine, is an absurdity, for which no one would contend, and it proves that the rule of the turntable cases does not rest upon a principle so broad, and of such rigid application, as counsel suppose. The owner of a thing dangerous and attractive to children is not always and inevitably liable for an injury to a child tempted by the attraction. His liability bears a relation to the character of the thing, whether natural and common, or artificial and uncommon, to the comparative ease or difficulty of preventing the danger without destroying or impairing the usefulness of the thing, and, in short, to the reasonableness and propriety of his own conduct, in view of all surrounding circumstances and conditions. As to common dangers existing in the order of nature it is the duty of parents to guard and warn their children, and, failing to do so, they should not expect to hold others responsible for their own want of care. But, with respect to dangers specially created by the act of the owner, *novel in character, attractive and dangerous to children, easily guarded and rendered safe* (italics ours), the rule is, as it ought to be, different; and such is the rule of the turntable cases, of the lumber-pile cases, and others of a similar character. But the owner of a thing dangerous and attractive to children is not always culpable, and, therefore,

is not always liable for an injury to a child drawn into danger by the attraction."

It would seem to be hardly necessary to cite other authorities than the above to show that the facts of this case do not bring it within the principle of the turntable and other like cases. Special attention is, nevertheless, invited to the cases referred to in *Peters v. Bowman*, *supra*, and also to the following cases: *Loftus v. Dehail*, 133 Cal. 214, [65 Pac. 379]; *Cooper v. Overton*, 102 Tenn. 211, [73 Am. St. Rep. 864, 45 L. R. A. 591, 594, 52 S. W. 183]; *Arnold v. St. Louis*, 152 Mo. 173, [75 Am. St. Rep. 447, 48 L. R. A. 291, 53 S. W. 900]; *Stendal v. Boyd*, 73 Minn. 56, [72 Am. St. Rep. 599, 42 L. R. A. 288, 75 N. W. 735]; *Sullivan v. Huidekoper*, 27 App. D. C. 154, [7 Ann. Cas. 196, 5 L. R. A. (N. S.) 263].

The above-named cases, notably the case of *Peters v. Bowman*, fully answer every point made by the plaintiff in his attempt to fasten upon the defendant responsibility for the death of his son, and clearly negative the proposition, earnestly pressed by the appellant, that the case at bar is to be differentiated from that of *Peters v. Bowman* upon the ground that in the latter case the alleged nuisance which caused the damage therein complained of was brought into existence by a natural cause or not by the act of the defendant, whereas, in the case at bar, the reservoir which caused the death of plaintiff's son was brought into existence solely by the act of the defendant. The clear and concise exposition of the turntable doctrine by Chief Justice Beatty, above quoted herein, does not support the proposition that the mere fact that the dangers are specially created by the act of the owner or occupier of the land on which they are maintained is itself sufficient to render the owner liable in the case of injuries to a child resulting therefrom or thereby. There are other elements superadded which are essential to fix upon the owner such liability, viz.: That the machinery must not only be novel in character and attractive to children, but "easily guarded and rendered safe." In other words, the machinery or other thing may be attractive and dangerous to children, and yet the owner of the machinery or thing would not be culpable if the dangers of the machinery or thing (which is intended for a useful purpose) cannot be removed without destroying or impairing its usefulness for the purpose it was designed to subserve.



We have found nothing in the cases cited and relied upon by the appellant in conflict with the above views or the conclusion which we have reached upon the facts as stated in the complaint. We are convinced that the complaint fails to state a cause of action for damages against the defendant, and that, therefore, the demurrer thereto was properly sustained.

Accordingly, the judgment appealed from is affirmed.

Chipman, P. J., and Burnett, J., concurred.

---

[Civ. No. 1765. Third Appellate District.—June 25, 1918.]

JENNIE MALALEY, Respondent, v. CITY OF MARYSVILLE (a Municipal Corporation), Appellant.

**SCHOOL LAW—SUPERINTENDENT OF SCHOOLS OF CITY OF MARYSVILLE—**

**CHARTER PROVISION NOT REPEALED BY CODE.**—Section 1617 of the Political Code, relating to the establishment and maintenance of schools in cities as part of the common school system of the state and which provides that boards of education in city school districts shall have power to employ a city superintendent of schools and fix and order paid his compensation, has not repealed by implication the provision of the charter of the city of Marysville which provides that the county superintendent of schools of Yuba County shall be *ex-officio* superintendent of public schools for the city of Marysville, and which fixes his compensation.

**ID.—SCHOOL DISTRICT AND MUNICIPALITY—EXERCISE OF SAME POWERS.—**

A municipality and a school district, the territorial boundaries of which are the same as those of the city, notwithstanding they are different and separate or distinct corporate entities, may, if the legislature elects to give them the right so to do, exercise precisely the same identical power with respect to matters connected with and calculated to further the interests of the public school system, in so far as such city and school districts are concerned, and merely because the Political Code in its provisions establishing a system of common schools, confers upon the board of education of a city the power to employ a superintendent of city public schools, it does not follow that the provision of a city charter authorizing the county superintendent to perform the duties of city superintendent thereby becomes a dead letter.

APPEAL from a judgment of the Superior Court of Yuba County. K. S. Mahon, Judge.

The facts are stated in the opinion of the court.

W. P. Rich, for Appellant.

W. H. Carlin, for Respondent.

HART, J.—At the general election in November, 1914, plaintiff was elected county superintendent of schools for the county of Yuba and assumed the duties of that office on the fourth day of January, 1915. She also performed the duties of city superintendent of schools of the city of Marysville for twenty months, commencing on said fourth day of January, 1915. She brought the action to recover compensation for her services as such city superintendent, alleging that the salary provided by law to be paid to her by defendant was the sum of fifty dollars per month, and also alleging that that sum was the reasonable value of the services so rendered by her. The trial was before the court, sitting without a jury; findings of fact followed the averments of the complaint and judgment was rendered in favor of plaintiff for one thousand dollars. The appeal is by defendant from said judgment.

The city of Marysville was first incorporated in 1855 (Stats. 1855, p. 23). There were amendments in 1857 (Stats. 1857, p. 40) and in 1866 (Stats. 1865-66, p. 69) and, in 1876 (Stats. 1875-76, p. 149), the city was incorporated. In none of these charters or amendments is there any reference to schools or educational matters.

By the terms of an act of the legislature, approved April 1, 1870 (Stats. 1869-70, p. 583), there was created a board of education for the city of Marysville, of which board the superintendent of public schools of the county was declared to be *ex officio* a member. It was also provided that said county superintendent should be *ex-officio* superintendent of public schools for the city of Marysville. The act specified what duties he should perform and fixed his salary at fifty dollars per month, "payable in the same manner as the salaries of other city officials."

In 1874 (Stats. 1873-74, p. 153) the legislature passed another act regarding said city superintendent and his duties

and all conflicting acts were repealed, but there was no material change from the act of 1870.

Appellant admits that respondent has acted, and is acting, as superintendent of schools of the city of Marysville, and concedes that she "has been, and now is, the *de facto* superintendent of schools of the city of Marysville," but contends that her compensation for rendering services as such superintendent must come from the board of education of said city, or, in other words, from the school fund, which is under the exclusive control of said board, and not from the city of Marysville.

Of course, there can be no *de facto* officer unless there is a *de jure* office, and the concession of the appellant necessarily assumes and further concedes that there is such an office of superintendent of schools of the city of Marysville existing by virtue of some law. And, if the respondent is a *de facto* officer, she has become so by virtue of her office as county superintendent of schools and not by employment by the board of education of the school district. However, as is conceded by the appellant, a *de facto* officer is entitled to receive the compensation prescribed for the services performed in executing the duties of such office.

The question to be decided here must, therefore, as appellant has suggested, depend upon the solution of the further question whether the provisions of the Political Code relating to the establishment and maintenance of schools in cities as part of the common school system of the state have had the effect of repealing those provisions of the Marysville charter providing that the county superintendent of schools of Yuba County shall act as superintendent of schools of said city and fixing the compensation for the services so performed at fifty dollars per month.

The constitution of the state (article IX, section 5) provides: "The legislature shall provide for a system of common schools, by which a free school shall be kept up and supported in each district at least six months in every year, after the first year in which a school has been established."

In pursuance of said section, the legislature has established a system of common schools and has gone into much detail in relation to the organization, government, and maintenance of the system, and has enacted provisions specially applicable

to common schools in cities. (Pol. Code, c. III, title III, part III.)

Section 1617 of said code contains, among others, the following provision: "The powers and duties of . . . boards of education in city school districts are as follows: 1. . . . 2. . . . 3. . . . 4. . . . 5. . . . 6. . . . 7: To employ a . . . city superintendent of schools and when necessary deputy or assistant city superintendent of schools, and to fix and order paid the compensation of the same unless the same be otherwise prescribed by law."

The above is the only provision of the Political Code of the many relating to the common school system and having special application to city common schools which might be said to have the effect of nullifying or repealing the provision of the city charter under the authority of which the respondent purports to exercise the functions of the office of school superintendent of and for the city of Marysville; but we see nothing in the language of the code provision which compels us to hold that it effected a repeal of the charter provision. Under subdivision 7 of the code section named, the board of education has the power to *employ* a superintendent of schools for the city, and it would probably be its duty to do so if the situation required such action. This is as far as the provision goes, and we cannot see why the charter provision cannot stand, even in the face of the power so conferred upon the board of education of the city, as a valid and enforceable part of the charter.

"Repeals by implication are not and have never been favored, and the courts will not so construe the effect of a subsequent statute upon a prior legislative enactment, where there is no express repeal of the prior statute by the later one, unless the two are, as to the vital matters to which they relate, irreconcilably inconsistent with or repugnant to each other." (*Mansfield v. Chambers*, 26 Cal. App. 499, 505, [147 Pac. 595].)

There is no inconsistency or repugnancy between the provision of the Political Code conferring upon the boards of education of cities the power to employ a school superintendent and the provision of the charter authorizing the county superintendent to perform the duties of the office for the city. The general purpose of the two provisions is precisely the same, and the result of the existence of the two provisions

is merely the providing of two different sources from which the city may receive the benefit of the services of such an officer. According to the stipulated facts of this case, the board of education of the city of Marysville has never exercised nor attempted to exercise the power conferred upon it by the Political Code to employ a superintendent of schools, and the duties of that office, if, indeed, it is in fact an office under the code until a person is duly employed to discharge the duties of a school superintendent, have always been performed by the county superintendent of schools of Yuba County under the authority of the charter provision above referred to.

It is, of course, to be conceded, as appellant points out, that a school district, the territorial boundaries of which are coterminous with the boundaries of the city in which it is situated, is a corporate entity, separate and distinct from the city as such an entity. It was so held in *Los Angeles School Dist. v. Longden*, 148 Cal. 380, [83 Pac. 246]. In that case the governing board of a school district, which, territorially, comprised the city of Los Angeles and certain contiguous outlying lands, inaugurated proceedings looking to the issuance of bonds of the school district for the purpose of erecting a schoolhouse, and after the holding of an election at which the question whether bonds should be issued was submitted to the voters of the district, who, by the requisite number of votes, approved the proposition, the board of trustees of the district duly certified to the board of supervisors of the county all the proceedings had in the premises, as required by section 1884 of the Political Code. The board of supervisors refused to issue the bonds, as provided by the section last mentioned, claiming that the city of Los Angeles, as a municipal corporation, and under its charter and the general laws of the state, was alone vested with the power to issue bonds for the purpose specified. The court, in that case, said, among other things:

“That school districts may in proper cases issue bonds is of course not disputed. It remains to be considered whether this general power to issue bonds which has been granted to school districts has been taken away from this particular school district by force of the charter of the city of Los Angeles. Upon this proposition the contention of respondent is that all matters touching schools within the corporate

limits of a city are 'municipal affairs,' and that as, under the provisions of section 6 of article XI of the constitution, the charter of a city is supreme in municipal affairs, the charter of Los Angeles thus becomes the sole guide, authority, and power for the issuance of school bonds; that the charter of Los Angeles denies the power to its board of education to take the initiatory steps toward the issuance of school bonds, and confers that power upon its city council; and that its city council, under the provisions of section 78 of the charter, draws its power from the provisions of the General Improvement Act of 1901. Herein reliance is placed upon the language of this court in the case of *Law v. San Francisco*, 144 Cal. 384, [77 Pac. 1014]. There this court had under consideration the question of the power of the municipality to issue bonds for the erection of new schoolhouses and the improvements of existing schoolhouses, and the case of *In re Wetmore*, 99 Cal. 151, [33 Pac. 769], was cited and quoted from, to the effect that as schoolhouses are essential aids in the promotion of education, their erection is but incidental to the maintenance of the schools, and falls as completely within the functions of a municipal government as does the erection of a hospital for its indigent poor or buildings for its fire-engines. It thus may be taken as decided and settled that a city, as such, may bond itself for public school purposes, and that this power extends to all cases where the object is in furtherance, and not in derogation of or in conflict with the general school system established by the state. For in this connection it must be remembered, as was said in *Hancock v. Board of Education*, 140 Cal. 554, [74 Pac. 44], that the school system of the state is a matter of general concern, and not a municipal affair."

The court then, after explaining, as first above indicated, that a school district and a city, although their territorial boundaries are coterminous, are, nevertheless, distinct and separate corporate entities, deriving their powers as such from different sources, proceeds to say: "What, therefore, the *Wetmore* case (99 Cal. 146, [33 Pac. 769]) and the *Law* case (144 Cal. 384, [77 Pac. 1014]) decided was that the erection of schoolhouses within the corporate limits of a municipality was justly to be regarded as a municipal affair, and that the city, therefore, as such, could create a bonded indebtedness for such and like purposes, even though power

to do the same thing was, under the general school system of the state, vested in a school district which, while occupying the same territory as that of the city, was still in point of law a distinct corporate entity. It follows, therefore, that the declaration of this court that the issuing of bonds for the building of schoolhouses by a city is a municipal affair constitutes in no sense a negation of the fact that another corporate entity—the school district—may under the general school system of the state, do the same thing for the same purpose.”

The above excerpts are thus brought into this opinion, not because we feel prepared to hold that a superintendent of city public schools, or the matter of the appointment or employment of one, is a municipal affair, but because the principle thereby enunciated and approved and as applied to the situation considered in that case supports the proposition for which the respondent contends here, viz.: That, notwithstanding that they are different and separate or distinct corporate entities, a municipality and a school district, the territorial boundaries of which are the same as those of the city, may, if the legislature elects to give them the right to do so, exercise precisely the same identical power with respect to matters connected with and calculated to further the interests of the public school system, in so far as such city and school districts are concerned, and that therefore, merely because the Political Code, in its provisions establishing a system of common schools, confers upon the board of education of the city of Marysville power to employ a superintendent of city public schools, *non constat* that the provision of the charter of the city of Marysville has become a dead letter; that on the contrary, the provision being one whose object is and has always been in *furtherance* and not in *derogation* of the general school system, cannot be held to be inconsistent or in conflict, but perfectly consistent therewith.

Of course, the provision of the charter with respect to the superintendent of schools for the city need not necessarily be observed—it may be put in abeyance by the exercise by the board of education of the power conferred upon it to employ a superintendent of the city schools, but this does not mean that thus the charter provision would be rendered null and void or be repealed, or that it is inconsistent with

the power conferred upon the board of education with respect to the subject to which it relates.

There was by the attorneys on both sides a sort of stipulation, somewhat vague in meaning and scope, from which it might be inferred that the Marysville school district not only embraces all of the city of Marysville but also a small strip of adjacent territory in which some twenty or thirty persons reside. The city attorney, representing the appellant, argues that the board of education and not the city of Marysville ought to pay the salary of the city superintendent of schools, because in that case the Marysville school district, including the outside territory, would be taxed for the purpose of raising this money to pay the superintendent's salary. "On the other hand," he continues, "if the salary of the school superintendent of the city of Marysville is paid by the city of Marysville, then the only property taxed to pay her salary will be the property within the corporate limits of the city of Marysville."

While, if it be true that the Marysville school district covers more territory than that comprehended within the municipal limits of the city of Marysville, it would only be just that those living outside the city limits and owning property situated in the outlying portion of the district should be made to bear their just and proper proportion of the tax necessary to pay the salary of the superintendent of schools of the city, yet the fact that they may not do so is no argument in impeachment of the proposition that the city of Marysville has the right, by virtue of the provisions of its charter, to provide for a superintendent of city schools and his compensation for performing the duties of that office, even though the district may extend territorially beyond the limits of the municipality. Nor, obviously, is it an argument supporting the proposition that the provision of the Political Code, empowering the board of education of Marysville to employ a superintendent of city schools, has had the effect of repealing by implication the provision of the city charter under which the county superintendent is acting, *ex officio*, as city superintendent of schools. The city of Marysville, when making provision in its charter for employing and compensating the county school superintendent to perform like services for the city, undoubtedly considered and determined that so much of the school district as lay within the limits



of the city would be benefited by such services commensurately with the burden thus placed upon its taxpayers. At any rate, the fact that there may be other territory than that of the city proper included within the school district can, in our judgment, have no material bearing upon the question whether the provision of the city charter we are considering is still a valid, existing law, notwithstanding the provision of the Political Code in question.

Our conclusion is that the judgment is correct, and it is, therefore, affirmed.

Chipman, P. J., and Burnett, J., concurred.

---

[Civ. No. 2403. First Appellate District.—June 25, 1918.]

BELLE E. HORNLEIN, as Executrix, etc., Respondent, v.  
J. H. BOHLIG et al., Copartners, etc., Appellants.

**MECHANICS' LIENS—ENGINEERING EXPERT—RIGHT TO LIEN.**—An engineering expert employed for a single and specified purpose in the construction of a building, even though he may not be classed as an architect, comes within the provisions of section 1183 of the Code of Civil Procedure, as one bestowing skill to be used in the construction of the building, and is entitled to a lien for the furnishing of engineering designs to the architects.

**ID.—NOTICE TO WITHHOLD—EFFECT OF CODE AMENDMENT.**—Section 1184 of the Code of Civil Procedure, as amended in 1911, does not, save at the option of the owner, secure unto persons giving the requisite notice an equitable garnishment upon the moneys due or to become due to the contractor.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. Jas. M. Troutt, Judge.

The facts are stated in the opinion of the court.

W. T. Kearney, for Appellants.

Sullivan & Sullivan and Theo. J. Roche, for Respondent.

**THE COURT.**—This is an appeal from a judgment in favor of plaintiff against the defendants for the foreclosure

of a mechanic's lien filed by plaintiff upon the property of defendants J. H. Bohlig and Lotta Bohlig.

Bohlig, the sole owner of a portion of the real property subjected to the lien, entered into a contract with Hladik & Thayer, architects, whereby said architects agreed to furnish all plans, specifications, architectural work, and superintendence employed in the construction of a building to be erected, and which was erected, upon Bohlig's land and partly upon land owned by Bohlig and his wife, Lotta Bohlig. Thereafter plaintiff entered into a contract with Hladik & Thayer, whereby plaintiff agreed to furnish the engineering designs of the building for which he was to receive \$620. The court found that plaintiff duly performed his part of the contract; that the engineering designs so furnished by plaintiff were actually used in the construction of the building; that defendants Hladik & Thayer paid on account the sum of \$270, and that \$350 remained unpaid. From these findings the court deduced the conclusion of law that plaintiff was entitled to judgment against defendants for the sum of \$350, and that said sum constituted a lien upon the real property.

Appellants contend that the furnishing of engineering designs was not a service of the character contemplated by section 1183 of the Code of Civil Procedure. That section provides *inter alia* that architects and all persons of every class bestowing skill or other necessary services to be used in the construction of a building are entitled to a lien whether at the instance of the owner or of any other person acting by his authority or under him as contractor, and further that every architect having charge of the construction, either in whole or in part, of any building shall be held to be the agent of the owner for the purposes of the lien law. It follows that the employment of plaintiff by the architects is equivalent to his employment by the owner. An engineering expert employed for a single and specified purpose in the construction of a building, even though he may not be classed as an architect, comes, we think, within the provisions of section 1183 of the Code of Civil Procedure, as one bestowing skill to be used in the construction of the building. In view of the finding of the trial court that the services of the plaintiff were actually used in the construction of the building and the plain language of the code, it seems clear to us that plaintiff was entitled to a lien.

The judgment, in so far as it orders that a writ of execution issue against the owner, Bohlig, as to any moneys in his possession payable to Hladik & Thayer, must be modified. Evidently that phase of the judgment is based upon the finding that plaintiff served upon Bohlig a notice to withhold moneys in his hands payable to Hladik & Thayer at a time when Bohlig had in his hands more than four hundred dollars payable to them. Section 1184 of the Code of Civil Procedure, as amended in 1911, does not, save at the option of the owner, secure unto persons giving the requisite notice an equitable garnishment upon the moneys due or to become due to the contractor (*Hubbard v. Jurian*, 35 Cal. App. 757, [170 Pac. 1093]), and therefore plaintiff is not entitled to a personal judgment against the owner, but must rely upon his lien.

Lotta Bohlig was sued and made a party defendant in the action under a fictitious name, and it is conceded that she was never served with summons and that she in no wise appeared or participated in the defense of the action. This being so, the trial court was without jurisdiction to render judgment foreclosing the lien against that portion of the property in which she had an interest. (*Gray v. Hawes*, 8 Cal. 562; *Ford v. Doyle*, 37 Cal. 346; *People v. Harrison*, 107 Cal. 541, [40 Pac. 956].)

Modified in accordance with these views, the judgment stands affirmed.

---

[Civ. No. 2672. Second Appellate District.—June 25, 1918.]

HARRIET H. PARAMORE et al., Respondents, v.  
HAYWARD COLBY, Appellant.

**APPEAL—DEFAULT IN FILING BRIEF—MISTAKE AS TO APPELLATE COURT—**

**RELIEF.**—The district court of appeal will grant a motion for relief from default in filing an opening brief on appeal, where the motion is made under the provisions of section 473 of the Code of Civil Procedure upon the ground of mistake, inadvertence, and excusable neglect arising from the fact that in good faith appellant believed that the action was one in equity and the appeal was properly taken by him to the supreme court.

MOTION to dismiss appeal and counter-motion for relief from default in filing opening brief.

The facts are stated in the opinion of the court.

Victor T. Watkins, and Sims & Church, for Appellant.

Groff & Van Etten, for Respondents.

CONREY, P. J.—This case now comes before the court upon a motion of respondents for dismissal of the appeal, and a motion of appellant for an order permitting him to file his opening brief on appeal.

The defendant appealed to the supreme court from the judgment entered against him. The action was brought to recover from the defendant a certain sum less than two thousand dollars claimed as the balance due on a contract for the sale of land between the plaintiffs' testator as vendor and the defendant as vendee. If, as claimed by the defendant, the action is a suit in equity, his appeal was properly taken to the supreme court. If, as claimed by the plaintiffs, it is merely an action at law for money due on a contract, the appeal should have been taken to the second district court of appeal.

The transcript on appeal was filed in the supreme court February 19, 1918. Under rule II of the supreme court appellant's brief was due on the twenty-first day of March. On March 19th the supreme court made an order extending appellant's time for filing said brief to and including April 20th. On the eighth day of April the supreme court made its order transferring the cause to this court. Appellant's brief has not yet been filed, but on the twenty-second day of April it was tendered to the clerk of this court for filing, in accordance with appellant's motion, of which notice had been duly given.

The respondents claim that the appeal was wrongly taken to the supreme court; that therefore the supreme court was without jurisdiction to make the order extending time, but could only make an order transferring the case to this court, unless it (the supreme court) first made an order transferring the cause to the supreme court. These contentions are based upon the provisions of section 4 of article VI of the constitution. Whatever our opinion of these contentions may be, it is not necessary to make decision thereon, since at

all events we think that the appellant's motion for relief from his alleged default should be granted. That motion is made under the provisions of section 473 of the Code of Civil Procedure, upon the ground of mistake, inadvertence, and excusable neglect arising from the fact that in good faith appellant believed, and still believes, that the action is one in equity and that the appeal was properly taken to the supreme court. It is true that the supreme court has made its order transferring the cause to this court upon the stated ground that the case is not one within its jurisdiction. But the decision thus made *ex parte* by the supreme court should not be regarded as binding upon appellant except for the purpose of the transfer. An inspection of the pleadings as set forth in the transcript shows that the defense made by the defendant turns upon the question as to whether the action is in fact of an equitable nature. That is the very matter which will be discussed in the briefs, and upon that matter appellant should have a hearing.

Respondents' motion for dismissal of the appeal and for an order vacating said order extending time is denied. Appellant's motion for relief from default is granted and it is ordered that his brief be filed.

James, J., and Works, J., *pro tem.*, concurred.

---

[Crim. No. 446. Third Appellate District.—June 26, 1918.]

THE PEOPLE, Respondent, v. ERNEST G. BOOTH,  
Appellant.

**CRIMINAL LAW — VOID SENTENCE — INDETERMINATE TERM — PRONOUNCEMENT OF SECOND SENTENCE — POWER OF COURT.**—A judgment in a criminal case sentencing the defendant for an indefinite term upon conviction of a crime committed prior to the enactment of the indeterminate sentence law is void, and the court has jurisdiction to pronounce a second sentence for a fixed term of imprisonment.

APPEAL from a judgment of the Superior Court of Butte County. H. D. Gregory, Judge.

The facts are stated in the opinion of the court.

No appearance for Appellant.

U. S. Webb, Attorney-General, and J. Chas. Jones, Deputy Attorney-General, for Respondent.

HART, J.—On the twentieth day of September, 1917, the defendant was charged by information filed by the district attorney of Butte County in the superior court of said county with the crime of forgery, alleged to have been committed on or about the eighth day of the preceding month of June. On the said twentieth day of September, upon being duly arraigned upon said information, the defendant entered a plea of guilty to the crime therein charged, and the court thereupon fixed Monday, September 24, 1917, at 10 o'clock A. M., as the time for the pronouncement of judgment of sentence, and on the day last mentioned the court, after due proceedings, sentenced the accused to be punished by imprisonment in the state prison at San Quentin "for the indeterminate term of one to fourteen years." The defendant was thereafter and in due time delivered by the sheriff to the custody of the warden of the state prison at San Quentin.

On the eighteenth day of March, 1918, and after serving six months in the state prison, the defendant addressed to the judge of the superior court of Butte County a letter in which he called the attention of the judge to the case of *Ex parte Lee*, 177 Cal. 690, [171 Pac. 958], on *habeas corpus*, and declared that, under the ruling in that case, the judgment sentencing him (defendant) to an indeterminate term was voidable, inasmuch as the crime for which he had been sentenced was committed before section 1168 of the Penal Code, authorizing indeterminate sentences, went into effect, the supreme court holding in the *Lee* case that the said section, as to defendants whose offenses had been committed prior to its enactment, was *ex post facto*, and, therefore, unconstitutional and void. Upon receiving and reading the said letter, the court, recognizing that error had been committed in the matter of pronouncing judgment of sentence against the defendant, made an order for the return of the prisoner into court to the end that a legal judgment might be pronounced and entered in the case. In pursuance of said order, the defendant was, on the twenty-second day of March, 1918, brought into court by the sheriff, and, after due proceedings,

the court sentenced the defendant to serve a term of five years in the state penitentiary at San Quentin. The defendant thereupon in open court gave notice of an appeal from the judgment so pronounced and entered.

The case was placed on the calendar of the June term of this court, and all the parties duly notified thereof. When the case was called in the regular order for argument, no one appeared for the defendant, and, as no brief had been filed (and it may be added none has since been filed) in support of whatever point or points the defendant intended to rely upon, the attorney-general submitted the case on the record, and so it now stands for our consideration.

We would have been justified in affirming the judgment without presenting, as above we have, a history of the case; but it appears from the record that the defendant has at all times been without the aid of counsel, and we conceived that it was only just to him to reproduce herein the facts as to the proceedings in the case, and thus show that there is no legal merit whatever in his appeal. The purported judgment originally pronounced was in a legal sense no judgment at all. Of course, it will not be contended that the court, under the circumstances indicated herein, lost jurisdiction to pronounce a valid judgment of sentence against the defendant.

The judgment is affirmed.

Chipman, P. J., and Burnett, J., concurred.

---

[Crim. No. 439. Third Appellate District.—June 26, 1918.]

THE PEOPLE, Respondent, v. LEE SING PARK,  
Appellant.

**CRIMINAL LAW—MURDER—EVIDENCE—HARMLESS ERROR.**—In this prosecution for murder, it is held there is nothing in any of the rulings on testimony which, even assuming some to have been erroneous, could have unduly prejudiced the rights of the defendant.

**ID.—VERDICT—SUFFICIENCY OF EVIDENCE.**—It is also held that the evidence was sufficient to support the verdict.

**APPEAL** from a judgment of the Superior Court of Sonoma County, and from an order denying a new trial Emmet Seawell, Judge.

The facts are stated in the opinion of the court.

W. F. Cowan, and Carl Barnard, for Appellant.

U. S. Webb, Attorney-General, and J. Chas. Jones, Deputy Attorney-General, for Respondent.

HART, J.—The defendant was convicted, in the superior court of Sonoma County, of the crime of murder of the first degree, the jury having, in the exercise of the discretion committed to them by section 190 of the Penal Code, adjudged that the accused be confined in the state prison for life.

The defendant has appealed from the judgment and the order denying his motion for a new trial, but no brief has ever been filed in support of the appeals, nor was he represented by counsel when the cause was called for hearing and argument at the regular June term of this court, upon the calendar of which the case was regularly placed for hearing and argument. The attorney-general, therefore, submitted the case upon the record.

The defendant was jointly charged by information with one William Yee and one Toy Yock of the crime of murdering one Hom Hong, on or about the eleventh day of March, 1917, at a ranch near the city of Santa Rosa, in the said county of Sonoma. He was given a separate trial, with the result as above stated.

William Yee, one of the defendant's codefendants, was, previously to the trial of the present case, separately tried and convicted of murder of the first degree, the jury fixing the punishment in his case at imprisonment for life, and upon appeal the judgment and the order were affirmed by this court on June 18, 1918. The general facts of this case are stated in the opinion filed in the said case of *People v. William Yee*, ante, p. 579, [174 Pac. 343], and it is, therefore, unnecessary to repeat them herein. Nor, since no argument, either oral or printed, was made before this court pointing out the errors, if any there were, upon which the appellant intended to rely for a reversal, is it necessary or even practicable for the court to consider herein the numerous exceptions reserved by the defendant to rulings admitting and excluding certain testimony. It must suffice to say, generally, that we have examined the record with care and perceive nothing in any of



the rulings upon the question of the propriety or impropriety of the testimony which, even assuming some to have been erroneous, could have unduly prejudiced the rights of the accused or which had the effect of depriving him of a fair and impartial trial. Indeed, we are justified in saying that the record is comparatively free from error, and that the accused was accorded a perfectly fair trial. As to the instructions, we are prepared to declare that a careful examination of the entire charge delivered by the court to the jury has convinced us that thus the law of the case was clearly and correctly stated.

There is no claim that the evidence was insufficient to support the verdict. Nor could such a claim find support in the record. The evidence, generally speaking, was, as above stated, the same as that presented in the case of *People v. William Yee*, and, as will be observed by an examination of the opinion in that case, it was amply sufficient to justify the jury, if they believed it, in finding the accused guilty. Indeed, we may say as to both cases that, under the evidence as it is presented to us, and as we are required to consider it, the accused can count themselves as singularly fortunate in having been saved from the extreme penalty which the law provides may be inflicted in a case of murder of the first degree; for the act of killing Hom Hong, by whomsoever committed, involved a deliberate and cruel murder, in the commission of which there appeared no circumstances of mitigation which justified the infliction of any punishment less than that of death.

The judgment and the order appealed from are affirmed.

Chipman, P. J., and Burnett, J., concurred.

[Crim. No. 434. Third Appellate District.—June 26, 1918.]

**THE PEOPLE, Respondent, v. JOE JACINTO, Appellant.**

**CRIMINAL LAW—ASSAULT WITH DEADLY WEAPON WITH INTENT TO MURDER—VERDICT SUPPORTED BY EVIDENCE.**—In this prosecution for an assault with a deadly weapon with intent to commit murder, it is held the evidence clearly shows the guilt of the accused, and the record shows no errors in rulings on testimony or in the giving of instructions.

**APPEAL** from a judgment of the Superior Court of Sacramento County. Malcolm C. Glenn, Judge.

The facts are stated in the opinion of the court.

George E. Foote, for Appellant.

U. S. Webb, Attorney-General, and J. Chas. Jones, Deputy Attorney-General, for Respondent.

**THE COURT.**—This case was submitted on the record by the attorney-general, no brief having been filed with or appearance otherwise made before this court to sustain the appeal from the judgment of conviction taken by the defendant.

We have, however, examined the record and have found no substantial ground for the appeal.

The offense of which the defendant was convicted was that of an assault with a deadly weapon with intent to commit murder. The evidence discloses that the assault was committed on the wife of the accused at their home in the town of Hood, in Sacramento County, in the month of July, 1917, the motive for the crime being that the wife—the victim of the assault—had threatened and was about to leave the defendant because of his alleged ill treatment of her and refused to heed his repeated demands that she remain with him. The evidence clearly shows the guilt of the accused.

We have found no errors in the rulings admitting and excluding evidence, while the charge of the court is in clear language, pertinent to the issues and otherwise unobjectionable.

The judgment is affirmed.

[Crim. No. 437. Third Appellate District.—June 26, 1918.]

THE PEOPLE, Respondent, v. JOE U. POPE, Appellant,

CRIMINAL LAW—INDETERMINATE SENTENCE—CRIME COMMITTED PRIOR TO ENACTMENT.—An indeterminate sentence for a crime committed prior to the adoption of section 1168 of the Penal Code, relating to indeterminate sentences, is improper.

ID.—RAPE—VERDICT SUPPORTED BY EVIDENCE.—In this prosecution for the crime of rape, it is held the verdict is supported by the evidence and that no prejudicial rulings appear.

APPEAL from a judgment of the Superior Court of Sacramento County. Malcolm C. Glenn, Judge.

The facts are stated in the opinion of the court.

S. Luke Howe, and C. H. Crocker, for Appellant.

U. S. Webb, Attorney-General, and J. Chas. Jones, Deputy Attorney-General, for Respondent.

THE COURT.—Defendant was accused by information of the crime of rape alleged to have been committed on the — day of May, 1917, his victim being of the age of eleven years. He was convicted by a jury and the court sentenced him to serve the term of fifteen years in the state prison at San Quentin. The crime was alleged and shown to have been committed on May 3, 1917, and prior to the passage or adoption of the new section 1168 to the Penal Code, relating to indeterminate sentences, and hence the sentence was properly imposed. (*Ex parte Lee*, 177 Cal. 690, [171 Pac. 958].)

The transcript was filed January 18, 1918, and was placed upon the June calendar. No brief has been filed by defendant and he made no appearance at the call of the calendar. On motion of the attorney-general the cause was submitted on the record. Although not required to do so, we have examined the transcript of the evidence and rulings of the court, with the result that the verdict is shown to have support and that no prejudicial rulings appear.

The judgment is affirmed.

[Civ. No. 2521. Second Appellate District.—June 26, 1918.]

**BURTON AUTO TRANSFER COMPANY et al., Petitioners,  
v. INDUSTRIAL ACCIDENT COMMISSION et al.,  
Respondents.**

**WORKMEN'S COMPENSATION ACT—DEATH OF DRIVER OF TRANSFER TRUCK—ACCIDENT ARISING IN COURSE OF EMPLOYMENT.**—Under the Workmen's Compensation Act, the death of the driver of an automobile truck for a transfer company was occasioned by an accident that happened in the course of his employment, where it was shown that he had loaded his truck and left it, as customary, in the street adjacent to the office during the noon hour, while waiting for the freight depot to open, and who in obeying instructions to get the truck and go to the depot, was struck and killed by a passing automobile while crossing the street.

APPLICATION for a Writ of Review originally made to the District Court of Appeal for the Second Appellate District to annul an award of the Industrial Accident Commission.

The facts are stated in the opinion of the court.

George H. Moore, for Petitioners.

Christopher M. Bradley, and Warren H. Pillsbury, for Respondents.

**WORKS, J., pro tem.**—This proceeding was instituted for the purpose of annulling an award allowing the mother of George Fickett a certain sum of money because of his death, said to have been caused by an accident occurring in the course of as well as arising out of his employment by the petitioner, Burton Auto Transfer Company. The employer was engaged in the transfer business and Fickett was a driver of one of its automobile trucks. The business was operated from an office, in Los Angeles, where orders were received from patrons who required the service of the company, and the drivers of its vehicles were accustomed to remain about the office awaiting orders at all times during working hours when they were not engaged in the operation of their trucks in the performance of their actual work. The owner of the com-

pany testified that Fickett's working hours were "any time from half-past 6 until he got through at night. Sometimes it was 4, sometimes it was 10, sometimes it was morning." No luncheon time was provided by the employer for the drivers. The owner said on this subject: "We leave that to the men. If they are in a hurry, or out in the country, it ain't no object to them to sit around for an hour. They eat their lunch and go on and lots of times they take it with them and eat it on the truck going along." He was then asked if that condition of affairs was changed to any degree when the men were in town and he said it was not. In response to a question as to whether the men could take longer than an hour for lunch if they desired, he said, "If they wished, if they weren't busy—no rules about that at all."

On the day that the accident occurred which cost Fickett his life he had been ordered, at about 11 in the morning, to haul a load of pipe from a certain establishment to the Southern Pacific depot. He procured his load and trucked it as far as the employer's office, where he arrived at 12 o'clock noon, the place being directly on his way to the depot. The depot was closed from noon until 1 o'clock, and Fickett stopped at the office on that account, instead of proceeding to his destination and being compelled to await the opening of the depot for the delivery of his load. He went into the office, leaving his truck on the opposite side of the street, where it was headed toward the depot and stood on the right side of the way. Moreover, the owner of the transfer company testified that, during the day, it was the custom of the drivers to park their trucks on either side of the street, in front of the office, and that space was reserved for that purpose on both sides. Trucks were run into the employer's yard at night only. Fickett remained in the office at least a part of the time from 12 to 12:45, but the record does not show whether he ate luncheon there, or at his home, which was near at hand, or whether he went to a restaurant for it, or, in fact, whether he partook of lunch that day at all. At any rate, he was at the office at 12:45. At that time, the owner of the company said to him, "Georgie, you better start along and you will be at the S. P. at the time they open the doors and get away a little quicker." Fickett then left the office, started to cross the street toward his truck, and was run down by a passing automobile.

The petitioner relies upon the many cases to the effect that one is not entitled to compensation under the Workmen's Compensation Act if he is injured while on the way toward or from his employment. These cases are not in point, for the reason that, at the time he was stricken, Fickett was not on the way to his employment. He had never left it. Under the facts above stated, he was within the hours of his employment, he was in a place where he had a right to be, and he had left his truck in a place where he had a right to leave it, in the regular and usual discharge of the duties he owed his employer. We are satisfied, and we need not cite authority in support of our view, that Fickett's death was occasioned by an accident that happened in the course of his employment and that it arose out of the employment.

The award is affirmed.

Conrey, P. J., and James, J., concurred.

---

[Civ. No. 2466. First Appellate District.—June 26, 1918.]

**FEDERAL CONSTRUCTION COMPANY** (a Corporation), Petitioner, v. **GEORGE KNEESE**, as Superintendent of Streets, etc., Respondent.

**STREET LAW—IMPROVEMENTS UNDER ACT OF 1911—RESOLUTION OF INTENTION—NAMES OF STREETS.**—In street improvement proceedings under the Improvement Act of 1911 (Stats. 1911, p. 730), the streets to be improved need not be mentioned by their official names in the resolution of intention, but may be referred to by the names by which they are commonly known.

**Id.—UNCERTAINTY AS TO LOCATION OF LINES—DEFECT IN RESOLUTION OF INTENTION CURED BY PLANS AND SPECIFICATIONS.**—Uncertainty as to the location of certain lines in the resolution of intention is cured by the plans accompanying the resolution and the specifications referred to therein, wherein the location of such lines is made certain.

**Id.—CHANGE OF GRADE—PROCEEDINGS UNDER ACT OF 1909—HEARING OF PROTESTS—PERSONS ENTITLED TO NOTICE.**—In a proceeding for the change of the grade of a street under the Change of Grade Act of 1909 (Stats. 1909, p. 1018), the proceeding is valid, notwithstanding upon the hearing of protests notice was only given of the hear-

ing of such protests to the persons protesting, since under such act no notice is required to be given of such hearing to nonprotesting owners.

**APPLICATION for a Writ of Mandamus** originally made to the District Court of Appeal for the First Appellate District to compel a superintendent of streets to sign a contract for street improvement.

The facts are stated in the opinion of the court.

Raymond Benjamin, and A. C. H. Hart, for Petitioner.

George Appell, for Respondent.

Heller, Powers & Ehrmann, for Intervener.

**BEASLY, J., pro tem.**—The Federal Construction Company petitions for a writ of mandate to compel the superintendent of streets of Daly City to sign a contract for the improvement of certain streets of that municipality pursuant to proceedings taken by its board of trustees under the Improvement Act of 1911 (Stats. 1911, p. 730), in conjunction with the act amendatory thereof of 1915 (Stats. 1915, p. 1464).

The case is an amicable one instituted for the purpose of determining the validity of the proceeding involved to the point which they have reached.

The first objection to the proceedings is that the streets involved are not mentioned by their official names in the resolution of intention. It is provided in section 3 of the Improvement Act of 1911 (Stats. 1911, p. 733) that the streets to be improved may be referred to by the names by which they are commonly known, and this was done.

The next objection is that the resolution of intention is uncertain in some particulars. The plans, however, which accompanied the resolution of intention, and the specifications that are referred to therein, if we understand counsel correctly, answer these objections by making the lines, which it might be impossible to locate if the resolution of intention stood alone, quite certain as to location.

Another objection to the resolution is that it cannot be determined therefrom whether a certain strip of vitrified

brick pavement excepted from the work to be done is in existence or to be hereafter constructed. It is plainly said in the resolution that this pavement is "to be constructed." This can only mean that it is to be constructed in the future, of course.

Other criticisms are aimed at the resolution and plans and specifications; but with all respect to counsel, who have so ably presented this matter as to lighten the labor of the court, we think them inconsequential.

The reference in the resolution of intention embraces matters concerning which the resolution may properly refer to the plans and specifications for a more particular description of the work; and the reference itself is sufficient for this purpose.

This disposes of criticisms aimed at the resolution of intention. It seems to be sufficient.

As we understand the next contention of counsel opposing the issuance of the writ, it is that the improvement is to be to a grade attempted to be established by a proceeding for change of grade had under chapter 677 of the Statutes of 1909 (Stats. 1909, p. 1018), and that the attempt in that proceeding to change the grade was futile because of the failure to give notice of the hearing of certain protests against the change of grade that were filed in that proceeding. It is stipulated by all the parties to this proceeding that the resolution of intention to change the grade was duly passed as provided by chapter 677 of the Statutes of 1909, and that notice thereof was given in the manner provided by section 2 of that chapter. The protests which were filed were made by owners of less than a majority of the property fronting on the streets where the change of grade was proposed to be made. The act under which the proceeding was had provided that the board of trustees should fix a time for hearing such protests, and give notice thereof in the manner therein specified to be given; and it was further provided that the board of trustees should hear said protests at the time and place appointed, or at any time to which the hearing thereof might be continued, and pass upon the same, and that its decision thereon shall be final and conclusive. While no notice was given of the hearing, the persons signing the protests did actually all appear before the board of trustees and present their protests, and were heard upon the same,



except that in one instance the protestant did not appear personally, but did appear by his son, who, it is stipulated represented him in the matter. It is now contended that this son did not have authority to represent this protestant, his father; but the stipulation is broad and can mean nothing if it does not mean that the son had such authority.

It is argued on behalf of the petitioner that the appearance by the protesting property owners before the board of trustees, and the hearing then given them, was all that was necessary to give the board jurisdiction to proceed with the work; that the reason for the publication of the notice was simply to apprise the protestants of the time and place of the hearing of their protests, and the notice was not addressed to any other person, and that they having been heard and their protests denied, the board thereupon acquired jurisdiction to proceed. On the other hand, the contention is made by the respondent that the purpose of the publication of the notice was to give notice to all persons owning property fronting upon the streets the grade of which it was proposed to change, whether protesting or not protesting; and, therefore, the fact that the actual protestants appeared before the board and were heard does not give the board jurisdiction, as it is said, to proceed with the work although the protests were denied.

With this latter contention we are unable to agree. Throughout the whole of section 3 of the act under which the proceeding for change of grade was taken, in mentioning who were to be heard upon the protests the legislature has used the words "such protests" and "said protests," referring definitely to the protests filed and to no other persons or objections whatever. No other construction can be given to the language of that lengthy section than that the protests to be heard were the protests which were filed, and none other. One reason for the adoption of the method of publication or posting instead of a personal service of notice of the hearing is the common one, that it was easier to meet the difficulty of serving a large number of persons by this substituted method—if it may be so called—than by seeking out the persons protesting at their various residences or places of business, and personally serving them there. Perhaps it might also have been considered less expensive and more certain, and its proof less open to the infirmities of oral

testimony, than a personal service. There is another sentence of section 3, however, which seems to us to conclusively point to the intention of the legislature as to who should be heard upon these protests. After providing for the nature and contents of the protests it is said that "Any protest not complying with the foregoing requirements shall not be considered by said city council." This, if the contention of the superintendent of streets be correct, would exclude from hearing an informal protest actually filed, and at the same time permit hearing a person who had not protested at all. That the legislature intended such a result is not reasonable to suppose. It is settled in *Farley v. Rein-dollar*, 174 Cal. 706, [165 Pac. 19], that property owners not protesting cannot object to the disposition of protests to which they are not a party. It follows that if the non-protesting property owners could not object to the disposition of the protests, the notice was not for their benefit. *Gray v. Burr*, 138 Cal. 109, [70 Pac. 1068], relied upon by the respondent in this case, is not in point, because in that case the protest was by the owners of a majority of the frontage, and the resolution ordering the work was passed without giving the protesting owners any opportunity to be heard at all.

Other cases relied upon by respondent are *Creed v. McCombs*, 146 Cal. 449, 452, [80 Pac. 679], *Southern Construction Co. v. Howells*, 21 Cal. App. 330, [131 Pac. 756], *Girvin v. Simon*, 127 Cal. 491, [59 Pac. 945], *People v. O'Neill*, 51 Cal. 91, and *Mahoney v. Braverman*, 54 Cal. 565. All these were cases where the notice which was not given was a notice of a hearing on an assessment for street work. Typical of the language of those cases is that of Mr. Justice James, of the second appellate district, in *Southern Construction Co. v. Howells*, as follows: "The city council, when it proceeds to give a hearing on an appeal against a street assessment under this act, cannot assume jurisdiction to make any order of determination therein until all property owners affected by the assessment, whether parties to the appeal or not, have been given notice of the hearing. There is but one way provided by the statute for the giving of this notice, and that is that it shall be published for five days." There is, however, a fundamental distinction between the notice required in a proceeding for

change of grade under the statute followed in the proceeding under review, and the notice of an assessment in a street improvement case. The protest of the protesting party in the case of an assessment, if granted, to the extent of either reducing his assessment or relieving him altogether from payment of that portion of the cost of the work assessed against his property, necessarily has the effect of raising the assessments of all the other property owners, whether they have protested or not. Therefore, they will be affected injuriously if the protest is granted. On the other hand, the Change of Grade Act of 1909, under which this proceeding was begun, provides for only two results upon the hearing of a protest on the change of grade. One of those results is the denial of the protest, following which the entire grade of the street would be changed as provided in the resolution of intention and the plans and specifications. On the other hand, if the protest is granted the whole proceeding stops. There is no middle course. The proposed grade is either abandoned or adopted *in toto* as planned and in accordance with the resolution of intention. Therefore, non-protesting property owners lose nothing of which they have not had previous notice by not being given an opportunity to be present at the hearing of the protests against the change of grade. We think the change of grade so established by the proceeding under examination was valid.

Judgment for plaintiff that a peremptory writ issue as prayed.

Kerrigan, J., and Zook, J., *pro tem.*, concurred.

---

[Civ. No. 2430. First Appellate District.—June 26, 1918.]

J. LEONARD ROSE, Respondent, v. MAYFLOWER CRAWFORD, Appellant.

JUDGMENT—MOTION TO VACATE—AUTHORITY OF ATTORNEY TO STIPULATE AS TO ENTRY—AFFIDAVIT ADMISSIBLE.—On a motion to vacate a judgment in an action to foreclose the rights of the purchaser under a contract for the sale of real property on the ground that the defendant was not in default under the contract and that her former

attorney was wholly without authority to stipulate that judgment should be entered against her, the affidavit of such attorney to the effect that she admitted her default and that the allegations of the complaint were substantially true was properly read at the hearing.

**ATTORNEY AND CLIENT—EVIDENCE—PRIVILEGED COMMUNICATIONS—WAIVER**—Where a client voluntarily testifies as a witness to confidential communications made by him to his attorney, he thereby waives the privileged character of such communications, and both he and his attorney may then be fully examined in relation thereto.

**APPEAL** from an order of the Superior Court of Alameda County denying a motion to vacate judgments. Everett J. Brown, Judge.

The facts are stated in the opinion of the court.

C. W. Eastin, for Appellant.

A. F. St. Sure, for Respondent.

**KERRIGAN, J.**—This is an appeal from an order denying a motion to vacate two judgments, one interlocutory and the other final, in an action by which the plaintiff sought to foreclose all the rights of the defendants under a written agreement to purchase an improved parcel of land situated in Alameda County.

On the third day of June, 1914, plaintiff's assignor, L. D. MacDonald, and the appellant entered into a written contract, whereby MacDonald agreed to sell to the appellant the real property described in the complaint for the sum of twelve thousand five hundred dollars, subject to a mortgage of five thousand dollars. Two thousand dollars was to be paid at the time the contract was executed, and upon the balance of the contract the appellant was to pay the sum of one hundred dollars per month until the whole contract price should be paid. There was a provision in the agreement to the effect that if the appellant failed to comply with its terms, she should forfeit all rights thereunder.

Upon the execution of the contract the appellant went into possession of the premises, and when this action was commenced about eighteen months later she was, according to the plaintiff's testimony, about six hundred dollars behind in her payments. The action was commenced in November, 1915, and the summons and complaint served upon the ap-

pellant and her husband. Thereafter, no answer having been made by the defendants, a judgment by default was taken against them. Forty-eight days later, by virtue of a stipulation entered into between the parties, the default was set aside. The defendants thereupon filed an answer, denying only that portion of the complaint which gave to the appellant credit on account of the monthly payments under her contract of \$1,002.20; and averring that she had paid on account thereof the sum of \$1,102.20; also praying that the court would fix a reasonable time within which she might pay the balance due. On January 21, 1916, a judgment by stipulation was rendered against the appellant, in which it was declared that she owed the defendant on account of the contract a specified sum, and decreed that all her rights in the property under the agreement be canceled and forfeited unless within thirty days from the entry of such decree she should pay to the plaintiff the amount then specified to be due.

On February 19, 1916, appellant changed her attorney, and two days later her new representative served and filed a notice of a motion to vacate the interlocutory judgment, and for permission to file a demurrer, answer, and cross-complaint. On February 23d, it appearing to the court from evidence taken at the hearing of said motion that the appellant had not complied with the condition of the interlocutory judgment, a final decree was entered against her in conformity to the prayer of plaintiff's complaint.

Thereafter, and on March 2, 1916, appellant served and filed a notice of motion to set aside this final judgment. This motion, as in the case of that previously made, was based upon section 473 of the Code of Civil Procedure. According to the affidavit filed by appellant in support of her motions, she was not in arrears in her payments when this action was commenced, and she claimed that had she been credited with all amounts paid by her, the account between the parties would have disclosed that all payments due at that time had been made; that she desired to defend the action, and that her former attorney was wholly without authority to stipulate that judgment should be entered against her. In opposition to her motion there was offered an affidavit by this attorney, from which it appeared that the appellant had freely admitted to him that she was in default under her con-

tract and that the allegations of the complaint were substantially true; that he thereupon told her in the presence of her husband, and on other occasions, that the best he could do for her was to get as much time as possible within which she might endeavor to find a purchaser for the property; that upon the rendition of the interlocutory decree he informed her of what had been done; that she declared herself satisfied, and stated that she would be able to dispose of the property within the thirty days allowed her in the decree within which to pay the amount in default.

Other affidavits and oral evidence introduced by the plaintiff, together with the weak explanation of the defendant and the attendant circumstances, tend strongly to show that she was in fact in default in her payments on the contract as recited in the judgment, and that she was aware that an interlocutory decree had been entered against her, and of its purposes and terms, and that she was, in accordance with the advice of her attorney, doing her utmost to find a purchaser for the property as before mentioned.

It thus appears that the appellant had no substantial defense to the action, and that the attorney who was at that time advising her took the course which to him seemed best calculated to conserve her interests in the property.

We are also of the opinion that the court committed no error in permitting to be read at the hearing upon the motions the affidavit of appellant's former attorney. The conversations between client and attorney therein related were not privileged, for where, as here, a client voluntarily testifies as a witness to confidential communications made by him to his attorney, he thereby waives the privileged character of such communications, and both he and his attorney may then be fully examined in relation thereto. (*Continental B. etc. Assn. v. Woolf*, 12 Cal. App. 726, [108 Pac. 729].)

In the case of *Security Loan & T. Co. v. Estudillo*, 134 Cal. 166, [66 Pac. 257], the facts are quite similar to those in this case. There it appeared that an attorney, employed for the defendant in an action to foreclose a mortgage, secured all the time he could for the defendant, having done which he waived further right to answer and stipulated that a default judgment might be entered. It was there held, upon an appeal from an order refusing to set aside the judg-

ment thereupon entered, that all presumptions are in favor of the order of the trial court; and that where the evidence is conflicting as to the authority of the attorney to stipulate for the judgment, the order must be affirmed. The court also held in the same case that no error was committed in allowing the defendant's attorney to testify as to his authority to enter into the stipulation, the court upon this point saying: "Defendant denies that any such authority was ever given. The attorney was the principal witness as to his authority and the purposes for which he was employed. The employment was not a privileged communication within the meaning of the statute."

The order appealed from is affirmed.

Beasley, J., *pro tem.*, and Zook, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 22, 1918.

---

[Civ. No. 2703. Second Appellate District.—June 26, 1918.]

J. C. CRAIG, Executor, etc., Respondent, v. CHARLES STANSBURY, Appellant.

[Civ. No. 2712. Second Appellate District.—June 26, 1918.]

CHARLES STANSBURY, Petitioner, v. SUPERIOR COURT OF LOS ANGELES COUNTY et al., Respondents.

**SUPERSEDEAS — NATURE OF REMEDY.**—The remedy by *supersedeas* is usually regarded as injunctive or prohibitive in character and not corrective.

**ID.—EXECUTION SALE AFTER APPEAL—VACATION—INHERENT POWER OF APPELLATE COURT.**—The appellate court, however, has inherent power by writ of *supersedeas* to vacate an execution sale made after the perfecting of an appeal and the giving of a stay bond.

**ID.—SALE BEFORE APPEAL—REMEDY.**—Where an execution sale has been completed before the appellate court acquires jurisdiction of the

appeal, the court, in view of section 946 of the Code of Civil Procedure, has no power by writ of *supersedeas* to set aside the sale, but any right of the judgment debtor to set aside the sale must be enforced in the trial court.

Id.—MOTION TO SET ASIDE EXECUTION SALE—CHARGES OF CONSPIRACY TO DEFRAUD NOT ENTERTAINABLE.—On a motion to set aside an execution sale, allegations of conspiracy to commit a fraud on the rights of the judgment debtor cannot be considered.

APPLICATIONS originally made to the District Court of Appeal for the Second Appellate District for a Writ of *Supersedeas* and for a Writ of Mandate. John M. York, Judge.

The facts are stated in the opinion of the court.

Andrews, Toland & Andrews, Kenton A. Miller, Hocker & Austin, and W. A. Alderson, for Petitioner.

Haas & Dunnigan, J. J. Wilson, George P. Adams, and Wm. M. Brown, for Respondent.

WORKS, J., *pro tem.*—For convenience, the action first above entitled, *Craig v. Stansbury*, will throughout this opinion be referred to as the action; and the second matter, *Stansbury v. Superior Court*, will be alluded to as the mandate proceeding. The action was commenced for the purpose of recovering on a promissory note, the plaintiff had judgment, and the defendant appeals. The appeal is not yet before us for decision; but the appellant asks for the issuance of a writ of *supersedeas*, upon his claim that the execution of the judgment had been stayed by the giving of bond, in connection with the appeal, before the making of a certain sale by the sheriff on execution, as well as upon grounds other than the ground that execution had been stayed. The application is made upon notice to the purchaser at the sale, as well as to the respondent in the action. After the appeal was taken, but before the application for a *supersedeas* was filed in this court, the appellant presented to the trial court, in the action, a motion to set aside the execution sale. That motion was made upon all the grounds now placed before us as a basis for the application for the *supersedeas*. The trial court entered a dismissal of the motion on the ground



that the "court has not jurisdiction to entertain" it "on the facts stated in the notice of motion." Thereupon the appellant instituted the mandate proceeding for the purpose of compelling the trial court to proceed to hear and determine the questions involved in the motion and an alternative writ was allowed.

Our first labor is to determine whether a *supersedeas* will issue out of this court, as demanded. It is to be observed, at the outset, that the form of relief now requested has had its most frequent use in those cases in which there has been a stay of the execution of a judgment appealed from, and in which the trial court has *threatened* to take some step toward an enforcement of the judgment, notwithstanding the operation of the stay (*McAneny v. Superior Court*, 150 Cal. 6, 9, [87 Pac. 1020]; *Southern Pac. Co. v. Superior Court*, 167 Cal. 250, 252, [139 Pac. 69]); in other words, the remedy by *supersedeas* is usually regarded as injunctive or prohibitive in character and not corrective. We are now, however, asked to apply the remedy as a corrective, by ordering vacated a sale which has been consummated by the sheriff, pursuant to final process of the court, after the perfecting of an appeal and the giving of a stay bond. Notwithstanding what we have said above as to the purpose for which the remedy by *supersedeas* usually has been employed, there is direct authority, also, for its use in such a case as this. In *Owen v. Pomona L. & W. Co.*, 124 Cal. 331, [57 Pac. 71], an appeal had been taken and a stay of execution was operative under it. The respondent, pending the appeal, took out an execution or order of sale and the sheriff sold certain property described in the decree appealed from. The appellant moved to set aside the sale and quash the execution on the ground that they were in violation of the right to a stay and the court granted the motion, going so far as to say, "No question is made as to the power and duty of this court to grant the relief sought by the motion if all proceedings on the judgment were stayed by the appeal." This case is directly in point here, and it has been cited with approval in *McAneny v. Superior Court*, *supra*, and in *Southern Pacific Co. v. Superior Court*, *supra*. We conclude that this court has the inherent power—for it is to that source that the right to issue the writ of *supersedeas* is ascribed by the authorities—to vacate the sale now sought to be set aside, if, as

claimed by the appellant, the appeal was perfected and a stay of execution became operative before the sale was made.

We are next to inquire whether the appeal had been perfected and the stay of execution imposed before the completion of the sheriff's sale; and, in determining this question, the property sold having been personalty, we consider the conclusion of the sale as being at least as early as the time of the issuance of the sheriff's certificate of sale. (Code Civ. Proc., sec. 700a.) The notice of appeal and the stay bond were filed with the trial court together, in point of time, and the execution sale was conducted, including the issuance of the certificate of sale, on the same day. The question of priority, as between the sale and the perfecting of the appeal, is therefore one of hours only. This fact is conceded by the entire record before us, which consists of voluminous affidavits and of some testimony from the witness-stand. It would serve no useful purpose to review the evidence on this question. We have examined it carefully and from our examination we now find and declare that the notice of appeal and bond were filed after the issuance of the sheriff's certificate of sale. The sale, therefore, worked no violation of any right of stay of execution.

We have already remarked that we are asked to set the sale aside on grounds other than the one that a stay of execution was in force at the time the sale was made. We have yet to determine whether we may entertain the motion on those grounds, which, speaking in general terms, are that the sale was conducted in furtherance of a conspiracy between all those who were parties to the sale, formed to cause a sacrifice of the property under levy at an inadequate price and for other purposes claimed by the appellant to be illicit and to work a fraud upon his rights. The appellant presents to us no authority and shows us no good reason which point to the power in an appellate court to set aside, by *supersedeas*, an execution sale completed before the court acquired jurisdiction of any appeal from the judgment for the enforcement of which the sale was made. The general character of the remedy, as that character is above stated, seems to prevent its application in such an instance. It is true, in addition to what we have already said concerning *supersedeas*, that the supreme court has allowed its use to create a stay of execution where none had been imposed by appeal or by bond

given pursuant to appeal (*Hill v. Finnigan*, 54 Cal. 493; *Rogers v. Superior Court*, 158 Cal. 467, [111 Pac. 357]; *Reed Orchard Co. v. Superior Court*, 19 Cal. App. 648, 667, [128 Pac. 9]), instead of merely allowing it for the purpose of protecting a stay already existent; but its use in those instances, as well as in all others, seems to have been predicated upon the ground that an appellate court may concern itself, by *supersedeas*, with acts either threatened or consummated after appeals have been perfected. Where an execution sale has been completed before an appeal has been taken from the judgment sought to be executed through such sale, any right of the judgment debtor to have the sale set aside must be enforced by appropriate proceeding in the trial court. This view is sustained, in effect, if not in terms, by the provisions of section 946 of the Code of Civil Procedure, which has to do with the effect of appeals upon proceedings in the trial court after judgments have been appealed from and upon the levy of executions outstanding for their enforcement.

We now turn to the mandate proceeding, in order to determine whether a peremptory writ shall issue requiring the trial court to proceed with the hearing of the motion to set aside the execution sale, on grounds other than the ground that a stay of execution was in effect at the time the sale was made, of which latter ground we have already disposed. The supreme court early declared that a motion to set aside an execution sale could not be entertained where the purchaser at the sale was a stranger to the judgment under execution (*Bryan v. Berry*, 8 Cal. 130); and a little later a judgment was affirmed in a case in which the trial court had set aside a sale in an action in equity brought to secure that relief (*San Francisco v. Pixley*, 21 Cal. 56). The case last cited was one in which a stranger had purchased at the sale, and *Bryan v. Berry* is cited in the opinion in connection with a query as to when relief, in such cases, may be had on motion and when by bill in equity. The question thus mentioned had not been presented by the parties and was stated by the court not to be before it. It was said in the opinion that "whether the application for relief should be presented by motion to the court or by bill in equity will depend upon the special circumstances of the particular case"; but further language was used in indicating a view of the court to the

effect that, where a third party was the purchaser and the sale had been closed by the execution of a final conveyance by the selling officer, the application for relief should be, or, at least, might be, by bill in equity. The grounds for relief in the case were that the property sold, being realty which lay in parcels, had been sold *en masse* and that the price paid was nominal and out of all proportion to real value. The question next came before the supreme court in *Boles v. Johnston*, 23 Cal. 226, [83 Am. Dec. 111]. The sale was there sought to be set aside on account of "numerous irregularities in the conduct of the officer in making the levy and sale," of which irregularities the purchaser at the sale was not alleged to have had notice. The court said: "Whether a court of equity might not grant relief in a proper case showing fraud in the conduct of the sheriff in selling property in violation of the rights of the parties and the requirements of the statute, of which the purchaser and those claiming under him had notice, or in which they may have participated, is a question unnecessary to determine in this case, as it is not founded upon any such state of facts. If the plaintiffs have any remedy at all under the facts stated, it is by motion properly made in the court where the judgment was rendered to set aside the sale, and not in this collateral action. The right of action here is founded solely upon these irregularities, and the court below committed no error in dismissing the action." These appear to be the only cases, in California, in which there is any mention of the question as to when execution sales may be set aside on motion and when that relief may be had pursuant to bill in equity; although we have a line of cases, beginning with *Brown v. Ferrea*, 51 Cal. 552, and running at least as late as *Anglo-Californian Bank v. Cerf*, 142 Cal. 303, [75 Pac. 902], and *Bechtel v. Wier*, 152 Cal. 443, [15 L. R. A. (N. S.) 549, 93 Pac. 75], in which the sufficiency of various grounds urged toward the setting aside of sales on motion is considered, it being assumed that the form of remedy chosen was an appropriate one. This assumption was doubtless proper, in each case, as each had to do with mere irregularities in sales, principally under the provisions of section 694 of the Code of Civil Procedure, laying down certain rules for the conduct of sales under execution. The supreme court, in at least two cases, also has considered the sufficiency

of grounds upon which, in actions in equity, attempts were made to set aside sales because of fraud and unfair dealing (*Odell v. Cox*, 151 Cal. 70, [90 Pac. 194]; *Rauer v. Hertweck*, 175 Cal. 278, [165 Pac. 946]; but in neither of them was the question of the propriety or exclusiveness of the remedy brought into question. Now, however, we are driven to repeat the query of the earlier cases. We have not to do with a question of irregularity in the conduct of a sale. There is before us a direct and circumstantial charge that a conspiracy was formed to commit a fraud upon the rights of the judgment debtor by making sacrifice of his property. Not only so, but it is charged that the conspiracy was executed by the performance of a series of acts which led to its successful culmination in the sale now sought to be set aside. To this conspiracy the county clerk and the sheriff, or deputies of each of them, are alleged to have been parties, along with the judgment creditor and the purchaser at the sale, and the acts done by each of them in furtherance of the conspiracy are distinctly set forth in the notice of motion and affidavits which were presented to the trial judge and which he refused to consider.

We are of the opinion that such matters cannot properly be considered on mere motion. Such a case does not seem to come within any decision of the supreme court authorizing, either tacitly or by direct decision, the setting aside of execution sales in that summary manner. Such motions are usually based upon affidavit, and the number of persons concerned in the charge here presented, the complexity of the charge, and the fact that it has to do with many matters extraneous to the sale itself—thus, as we have already said, presenting a case entirely different from one of mere irregularity in a sale—all seem to frame a controversy which ought not to be, and which in justice to all concerned could not be, determined upon such an informal presentation. It is said in *Freeman on Executions*, third edition, section 310: "Where grounds exist for vacating a sale, which rest not in irregularity of proceeding, but in fraudulent devices practiced upon the complainant, or in accident or mistake for which he has suffered, and from which he is entitled to relief, he may, before conveyance is made to the purchaser, proceed either by motion in the original case or by bill in equity. In this, however, as in other matters within the

concurrent jurisdiction of law and equity, the choice and propriety of remedy are governed by considerations of adequacy and expediency; and since the importance of these considerations depends quite usually upon the circumstances of the case in hand, it is impossible to deduce from the cases an inflexible rule determining the proper choice of remedy where the end sought is the vacation of an execution sale. The proper criterion for determining this matter is found in the nature of the question, and the character of the issue, which must be weighed and decided before the relief sought can be granted or denied. Fraud, mistake, irregularities, and inadequacy of price may justify the setting aside of an execution sale upon motion; but the nature of the proceeding by motion renders it applicable with propriety only to a minority of the cases where such grounds for vacation are set forth. If a conveyance has been executed, and the purchaser thereby vested with the legal title, it is doubtful whether he can be divested of it by motion. If the charge is that the sale ought to be vacated for matters not apparent from an inspection of the proceedings, such as combination to depress the bidding, or any other species of fraud, or for any misconduct on the part of the officer conducting the sale, the better opinion is that the purchaser's title cannot be divested otherwise than by an independent suit in equity against him."

The motion, addressed to this court in Civil No. 2703 and demanding that the execution sale be set aside, is denied. The alternative writ of mandate, in Civil No. 2712, is set aside and the application for a peremptory writ is refused.

Conrey, P. J., and James, J., concurred.

Petitions to have the causes heard in the supreme court, after judgment in the district court of appeal, were denied by the supreme court on August 22, 1918.

[Civ. No. 2671. Second Appellate District.—June 27, 1918.]

MARTHA B. SIMMONS, Petitioner, v. SUPERIOR COURT OF THE COUNTY OF SAN DIEGO et al., Respondents.

**JUSTICE'S COURT OF APPEAL—PAYMENT OF FEES—TIME.**—On an appeal from a justice's court, it is not necessary that the fees provided by section 981 of the Code of Civil Procedure to be paid to the county clerk for filing the transcript on appeal and placing the action on the calendar in the superior court should be paid to the justice at the time of the filing of notice of appeal, and where paid within the thirty-day period allowed for taking the appeal, the statute has been sufficiently complied with, and jurisdiction of the appeal acquired.

**APPLICATION** for a Writ of Review originally made to the District Court of Appeal for the Second Appellate District to annul an order denying a motion to dismiss a justice's court appeal.

The facts are stated in the opinion of the court.

Albert J. Lee, for Petitioner.

Theodore Stensland, for Respondents.

**SHAW, J.—Certiorari.** On November 11, 1915, in a certain case wherein petitioner was plaintiff and one Elizabeth G. Clarke was defendant, a judgment was rendered in the justice's court of San Diego Township in favor of plaintiff. On November 20th defendant served upon plaintiff's attorney a notice of appeal to the superior court, wherein it was further stated: "You will further take notice that an undertaking on said appeal was this day filed in said justice's court." This notice, together with the undertaking on appeal, was on the same day deposited with the justice of the peace, who indorsed thereon: "Filed November 20, 1915, J. Edward Keating, Justice of the Peace." At the time of depositing and filing these documents the appellant did not pay the justice of the peace the fees provided by law to be paid to the county clerk for filing the transcript on appeal and placing the action on the calendar in the superior court.

On December 10th, however, which was within the time specified by law for perfecting the appeal, she did pay to the justice of the peace such fees, which were transmitted to the county clerk, together with the papers on appeal. Thereafter, upon the ground that the court was without jurisdiction to try the case, plaintiff moved to dismiss the appeal, which motion by order of court being denied, petitioner by this proceeding seeks to have the same annulled.

Her contention is that no undertaking on appeal was filed within five days after the filing of the notice of appeal, as required by section 978a of the Code of Civil Procedure. As we have stated, the notice was duly served on November 20th, on which day it was deposited with the justice who indorsed it as filed of that date. It is conceded that an undertaking in due form was filed within five days thereafter. Petitioner insists, however, that the filing of the undertaking was ineffectual, for the reason that the notice of appeal must be deemed to have been filed on December 10th, at which time the fees were paid. In the case of *Simmons v. Superior Court*, 30 Cal. App. 252, [157 Pac. 817], wherein this petitioner sought a writ of prohibition to restrain the superior court from proceeding with the trial of the case, upon the ground that since the fees were not paid at the precise time of filing the notice of appeal, the filing thereof was ineffectual for the purpose of conferring jurisdiction upon the superior court, this court, in considering such question, said: "The purpose of the enactment of section 981 of the Code of Civil Procedure was to provide for the payment of the clerk's fees at the time of transmitting to the superior court the papers on appeal; and where the fees, though not paid to the justice at the time of presenting for filing the notice of appeal, are nevertheless paid within the thirty days allowed for taking the appeal so as to enable him to transmit the fees, together with the papers on appeal, it is, in our opinion, a sufficient compliance with the statutory provision." We adhere to the conclusion reached in that case, viz., that the notice of appeal was filed on November 20th when deposited with the justice and indorsed as filed of that date, from which it follows that, since the undertaking on appeal was filed within five days thereafter, it constituted a sufficient compliance with the provisions of section 978a of the Code of Civil Procedure. "The provisions conferring the right of appeal and prescribing the pro-



cedure are remedial and should not be unduly hampered with constructive restrictions which will cast doubt upon the jurisdiction of the appellate court." (*Rigby v. Superior Court*, 162 Cal. 339, [122 Pac. 958].)

It is true that in the opinion in the case referred to this court, in response to one line of argument urged by the petitioner therein, said: "Assuming, as claimed by petitioner, that the notice of appeal could not be deemed filed until payment of the fees in question was made, then, since it was left with the justice whose duty it was to file it upon payment of the fees, it should be deemed filed as of the date on which the fees were paid." It is clear, however, that the decision was not based upon the correctness of petitioner's contention, but, *even if well founded*, the court held it insufficient to warrant the relief asked. The statement based upon the assumed correctness of petitioner's claim was unnecessary to the decision, which was clearly founded upon other grounds, which must be deemed conclusive as to the question involved in the instant case.

Since the notice of appeal, as held in *Simmons v. Superior Court*, 30 Cal. App. 252, [157 Pac. 817], was filed on November 20th and the undertaking on appeal, as conceded, was filed within five days thereafter, it necessarily follows that such act constituted a full compliance with the provisions of section 978a of the Code of Civil Procedure.

The order sought to be annulled is affirmed.

Conrey, P. J., and James, J., concurred.

---

[Civ. No. 2357. First Appellate District.—June 27, 1918.]

HARRY HERMAN, Respondent, v. JOHN C. ROHAN et al.,  
Appellants.

**LANDLORD AND TENANT—RENTAL OF MARKET STALL—RIGHT OF RENTER TO SELL INTEREST—CONSTRUCTION OF AGREEMENT.**—An agreement between the owners of a market and the renter of a stall therein giving the latter the right to sell his interest in the stall upon condition that the purchaser pay a monthly rental does not make the right of sale dependent upon the suitability of the purchaser, except as to payment of rent, if that be classed as suitability.

- ID.—STATUTE OF FRAUDS—RIGHT TO SELL INTEREST IN STALL.**—An agreement between the owners of a market and the renter of a stall therein giving the latter the right to sell his interest in the stall is not one which, by its terms, was not to be performed within a year from the making thereof under subdivision 1 of section 1973 of the Code of Civil Procedure.
- ID.—SALE OF INTEREST IN STALL—RIGHT OF RENTER.**—The owners of a market in renting a stall, even considering the matter a personal privilege or license, have the right to agree that the renter may sell such privilege.
- ID.—TERM OF HIRING—RIGHT TO SELL INTEREST.**—Where in the renting of a market stall no term is agreed upon and a monthly rent is paid, it is presumed, under section 1943 of the Civil Code, that the hiring is for a year, and where possession is continued beyond the year and rent accepted, the hiring is presumed to be resumed from month to month upon the same terms, and the interest of the hirer is more than a privilege, he having the right to sell and assign his interest in the stall.
- ID.—SUITABILITY OF PURCHASER—IMPLIED CONDITION—EFFECT OF RIGHT TO SELL INDEPENDENT OF AGREEMENT.**—Where the renter of a market stall, aside from the agreement of hiring, has the right to sell and assign his interest, any implied condition that in case of sale the purchaser should be a suitable person is wiped out, and the renter may sell to whomsoever he chooses, so long as the purchaser pays the rent.

APPEAL from a judgment of the Superior Court of Alameda County. W. M. Conley, Judge Presiding.

The facts are stated in the opinion of the court.

Wm. R. Geary, for Appellants.

M. J. Rutherford, for Respondent.

BEASLY, J., *pro tem.*—Stripped of immaterialities the facts of the case are as follows: The plaintiff Herman took a stall in an Oakland market from the defendants. He purchased the right to occupy the stall in another market than the one in question here from the defendants, who were the owners of that market, and from another person who occupied the stall so purchased, and paid the defendants and his predecessor a substantial sum of money therefor. Presently the defendants built a new market, and Herman was transferred to a stall therein, and from time to time purchased additional

frontage, thus enlarging his stall, paying in each instance an additional sum to the defendants as a sort of bonus therefor, and paying in addition \$1.75 per front foot per month for each foot of space embraced within the stall. At one of the times when the plaintiff purchased extra frontage from the defendants, paying two hundred dollars therefor, they agreed, in consideration of this purchase, that the plaintiff might sell all his right, title, and interest in the stall for any price he might obtain to any purchaser he might secure, upon the condition only that the purchaser should pay the \$1.75 per front foot monthly rental charged for the use of the property. Plaintiff thereafter secured a purchaser who was ready, willing, and able to buy his right to the stall for the sum of five hundred dollars, which he agreed to pay therefor, this sum being payment for whatever right and interest the plaintiff had in the market and for the fixtures in his stall. The defendants refused to permit this sale to be made, and refused to permit a transfer of the possession of the stall to the purchaser. Plaintiff thereupon began this action for breach of the defendants' contract with him, and obtained a judgment in the court below for \$475 as damages therefor.

On this appeal the defendants contend, first, that they did nothing more than agree that plaintiff could sell to a suitable person only. The answer to this is that the finding of the court, based upon sufficient evidence, is exactly as above set forth, and that there was no condition whatever in their agreement as to the suitability of the person to whom the plaintiff might sell, except that such person should pay the monthly rental, if that be classed as suitability.

The second contention of appellants is that "no action of defendants could prevent plaintiff from selling that which he owned and had acquired by a proper conveyance." But in this case the defendants could and did prevent Herman from selling by refusing to permit the person to whom he sold to take possession of the subject matter of the sale, namely, the right to occupy the stall and the fixtures therein contained.

Defendants' third contention is that, "Even if the defendants had agreed to permit Herman to sell, it was an oral agreement and had to be performed within one year." But the answer to this is that the agreement was not one which, by its terms, was not to be performed within a year from the making thereof. (Code Civ. Proc., sec. 1973, subd. 1.)

The defendants' fourth contention is that "Plaintiff claims no interest in the realty, and if so, has failed to prove his title thereto by proper deed duly acknowledged." This claim must be considered in connection with another which is argued more definitely, to the effect that the plaintiff's rights were in the nature of a personal privilege to occupy the market, and were therefore not assignable. In answer to this it may be said that even considering the matter a personal privilege or license, there is nothing whatever in the law to prevent the defendants from making an agreement, if they saw fit, to the effect that this personal privilege might be assigned. The property was theirs; they were letting whatever privilege Herman had and whatever rights he possessed in the stall to him; and they could legally—and the court found that they did—agree that he might sell those rights as above set forth.

The interest which Herman had in the stall, however, was something more than a privilege. He paid a monthly rental therefor; no term of his hiring was fixed, and no usage on the subject of the length of the term is shown. It is therefore presumed that his hiring was for one year from its commencement (Civ. Code, sec. 1943), and when he remained in possession beyond the year and his landlords accepted rent from him, the parties were presumed to have renewed the hiring upon the same terms from month to month. (Civ. Code, sec. 1945.) Aside, therefore, from the agreement, Herman had the right to sell and assign his lease; and if, because of the nature of the property as a market, there was an implied condition that in case of sale the purchaser should be a suitable person, that condition was wiped out by the point blank agreement found by the court to the effect that he might sell to whomsoever he chose so long as the purchaser would pay the rent.

The judgment is affirmed.

Kerrigan, J., and Zook, J., *pro tem.*, concurred.

[Crim. No. 438. Third Appellate District.—June 27, 1918.]

THE PEOPLE, Respondent, v. FRANK PIMENTEL,  
Appellant.

CRIMINAL LAW—APPEAL—SUPPORT OF VERDICT—PRESUMPTION.—On appeal from a judgment and order denying a new trial in a criminal case, the presumption is that no prejudicial error was committed and that the verdict is amply supported.

ID.—ROBBERY—VERDICT SUPPORTED BY EVIDENCE.—In this prosecution for robbery, it is held that the verdict is supported by the evidence.

APPEAL from a judgment of the Superior Court of San Joaquin County, and from an order denying a new trial. D. M. Young, Judge.

The facts are stated in the opinion of the court.

B. M. Bainbridge, for Appellant.

U. S. Webb, Attorney-General, and J. Chas. Jones, Deputy Attorney-General, for Respondent.

THE COURT.—The defendant was convicted of robbery, and from the judgment and the order denying his motion for a new trial he brings this appeal.

No appearance in his behalf has been made in this court and we have been furnished with no statement of any reason for disturbing the verdict found against the defendant.

Of course, the presumption is that no prejudicial error was committed and that the verdict is amply supported. We may add that we have sufficiently examined the record to be convinced that the defendant was justly convicted.

The judgment and order are affirmed.

[Crim. No. 441. Third Appellate District.—June 27, 1918.]

THE PEOPLE, Respondent, v. STEFANO FLACCO,  
Appellant.

**CRIMINAL LAW—RECORD—AFFIRMANCE OF JUDGMENT.**—Where there has been no appearance for the appellant, and an examination of the record shows that he has been fairly tried and justly convicted, the judgment will be affirmed.

**APPEAL** from a judgment of the Superior Court of San Joaquin County, and from an order denying a new trial.  
D. M. Young, Judge.

The facts are stated in the opinion of the court.

A. H. Carpenter, for Appellant.

U. S. Webb, Attorney-General, and J. Charles Jones,  
Deputy Attorney-General, for Respondent.

**THE COURT.**—There has been no appearance in this court for appellant. An examination of the record thoroughly convinces us that he was fairly tried and justly convicted.

The judgment and order are, therefore, affirmed.

---

[Civ. No. 1809. Third Appellate District.—June 27, 1918.]

S. M. SPURRIER et al., Appellants, v. W. C. NEUMILLER,  
as County Treasurer, etc., Respondent.

**RECLAMATION DISTRICT—ENTRY OF CREDIT ON ASSESSMENT—MANDAMUS**  
—**ESSENTIALS.**—To entitle land owners to *mandamus* to compel entry of a credit on a reclamation district assessment declared invalid after payment of the assessment, it is incumbent upon them to show that they are injured by failure to so credit their land.

**ID.—ADVANTAGE OVER OTHER LAND OWNERS—MANDAMUS.**—*Mandamus* will not lie at the instance of land owners to compel the entry of a credit on an invalid assessment, where it appears that, if the writ were granted, they would gain an advantage over other land owners

who have already been charged with an excess amount to equalize the burden.

**ID.—INTEREST ON PAYMENTS—INSUFFICIENT GROUND FOR WRIT.**—Where land owners have been given credit on an invalid reclamation district assessment, and they did not demand or claim interest, they are not entitled to the writ because interest was disregarded.

**ID.—LAND OWNERS, WHEN NOT ENTITLED TO CREDIT.**—Section 3466½ of the Political Code, in its original form, does not entitle land owners to reimbursement where the payments were made by former owners, and no showing is made that they expended anything therefor or incurred liability in consequence thereof.

**ID.—CHANGE OF POLICY OF REASSESSMENTS — CODE AMENDMENT — CONSTITUTIONAL LAW.**—The legislature in amending section 3466½ of the Political Code (Stats. 1911, p. 647) changed the policy of levying reassessments in reclamation districts, but did not thereby deprive any land owners of any contractual right, and the application of such amended section is not violative of section 10, article I, of the federal constitution, or of section 16, article I, of the state constitution.

**APPEAL** from a judgment of the Superior Court of San Joaquin County. J. A. Plummer, Judge.

The facts are stated in the opinion of the court.

D. V. Marceau, John A. Wilson, and S. M. Spurrier, for Appellants.

Clary & Louttit, and Gerald Beatty Wallace, for Respondent.

**BURNETT, J.**—The controversy herein arises by reason of two assessments levied by Reclamation District No. 17 in the county of San Joaquin. The first one, which we will denominate the "Bonbini assessment," was based upon a petition filed with the board of supervisors of said county on the second day of April, 1907, Charles and George Dangers being then the owners of the lands herein involved. The property was charged with an assessment of \$3,270.63, against which a credit of \$900.18 was allowed in consequence of a former assessment, and the balance with interest was finally paid on March 3, 1909. On May 9, 1911, by judgment entered in the superior court of said county, the Bonbini assessment was decreed to be invalid. Seven land owners within the district did not pay the Bonbini assessment.

The other, which we may call the Spurrier assessment, was based upon a petition filed on the sixteenth day of October, 1911. In apportioning this assessment, the commissioners equalized the inequalities caused by the payment by some and the failure of payment by others of said invalid assessment. As to this the court found: "The said commissioners did charge and assess against the said respective parcels of land situated in said district, against which the said prior assessment had been declared by a court of competent jurisdiction to be invalid, and which said assessment remained unpaid, with such proportion of the former invalid assessment as the benefits derived by the said respective parcels of land from the reclamation works for which said former assessment was levied bore to the whole amount of said former invalid assessment, and the said charges and assessment so fixed and levied by said commissioners against said respective parcels of land, did charge the said last-named parcels of land, and each of the other tracts of land within the said district with its proper proportion of the costs of the reclamation of the lands therein; . . . that the land of plaintiffs has not paid and it has not been charged with more than its proper proportion of the costs of reclamation."

It is not contended that this finding is unsupported. Indeed, it was stipulated at the trial "that the commissioners in levying and charging the lands in said Reclamation District No. 17 in 1911 did charge and assess against the respective parcels of land situated in said district, and which said parcels of land did not pay the former invalid assessment, with such proportion of such former assessment as the benefits derived by said respective parcels of land from the reclamation works for which said former invalid assessment was levied bore to the whole amount of said former invalid assessment."

Notwithstanding the foregoing stipulation and finding, it is the contention of appellants that the county treasurer of said county should be compelled to enter a credit of the amount paid by said Charles and George Dangers on the Bonbini assessment to be applied *pro tanto* to the payment of the Spurrier assessment. The basis for the claim is found in the following language of section 3466½ of the Political Code as it formerly existed:



"In all cases in which an assessment shall have been levied since October first, eighteen hundred and ninety-six, or shall hereafter be levied, for reclamation purposes, upon the lands embraced within any reclamation district, and the assessment shall have thereafter been or shall be adjudged invalid, by any court of competent jurisdiction, and any land owner of the district shall have paid the amount assessed, in said assessment, against land belonging to him, before said assessment shall have been or shall be so adjudged invalid, the amount so paid by said land owner, together with the legal interest thereon from the date of its payment, shall be credited, by the treasurer of the county in which said land is situated, to the tract of land on which the same was paid, and shall be applied upon any assessment thereafter levied on the lands of the district, to the payment, *pro tanto*, of the amount therein assessed against said tract of land."

In explanation of the course pursued in equalizing said assessment it is proper to say that by an amendment taking effect April 5, 1911, [Stats. 1911, p. 647], and prior to said Spurrier assessment, the said section 3466 $\frac{1}{2}$  was made to read as follows: "In all cases in which an assessment shall have been levied or shall hereafter be levied, for reclamation purposes upon the lands embraced within any reclamation district, and if the assessment upon any tract or tracts of land shall have thereafter been adjudged invalid by any court of competent jurisdiction, or if, for any reason, any tract or tracts of land shall not have been charged with said assessment, then such tract or tracts of land shall be charged in any subsequent assessment with such proportion of the former assessment, as the benefits derived by said land from the reclamation works for which said former assessment was levied bears to the whole amount of said former assessment; or a subsequent reassessment of such tract or tracts of land made be made separately for the purpose of charging said land with its proper proportion of the costs of reclamation." In this connection we may state that the validity of this Spurrier assessment under said section as amended was upheld by the supreme court on an appeal taken by these same appellants in the case of *Spurrier v. Reclamation District No. 17*, 172 Cal. 157, [155 Pac. 840]. In the leading opinion filed in said cause it is declared that "the legal effect of the amendment was, of course, to repeal the portion of the section, which had

been omitted and leave the rights of those owners who had paid an assessment adjudged invalid unaffected by any express statutory provision as regards the obtaining of credit for such payment."

This language would seem to imply that there is no longer any statutory authority for allowing credit for the payment of the invalid assessment. It is fair though to say that the supreme court in another portion of the opinion specifically disclaimed the purpose of determining in that decision whether the appellants were entitled to credit for said payment, and in the concurring opinion of Mr. Justice Shaw it was suggested that "if the parties who paid the assessment have any remedy for the interest afterward accruing thereon, it must be sought by some other mode than by including it in a reassessment upon the delinquent lands under the section as amended in 1911."

But assuming that said section 3466½ in its original form created a vested right to a credit in favor of appellants, which could not be impaired or destroyed by a subsequent amendment to the law, it is entirely apparent that said appellants were not entitled to the mandate as applied for. This follows from the said stipulation and finding that there was an equalization of the inequalities which arose from the Bonbini assessment. In other words, those who did not pay said assessment were required by the Spurrier assessment to pay their proportion of the former assessment as well as of the latter. Thus, in effect, were appellants given credit for their payment of the Bonbini assessment except the interest, as the others were compelled to make a similar payment. In other words, the situation was rendered practically the same as though all the land owners had paid their full proportion of the invalid assessment. In such condition, how would credit be given? Suppose there were four land owners all together, and an invalid assessment of one hundred thousand dollars had been levied and paid by them, twenty-five thousand dollars each, and it was necessary to raise another hundred thousand dollars by assessment. The money could not be raised by crediting the land with the payment of the invalid assessment. If it were desired to give each parcel of land specific credit for the payment of the invalid assessment, it would be necessary to petition for an assessment of

two hundred thousand dollars, in order that after full credit had been given there might be available one hundred thousand dollars to apply to the purposes of the second assessment. But it is obvious that no more would be required of each land owner if the assessment were for one hundred thousand dollars and he be required to pay his proportion. The nonpaying land owners in the case at bar having been required to make good their delinquency on the invalid assessment, we have a similar situation to one wherein all the land owners have paid the invalid assessment.

Of course, to entitle them to the writ, it was incumbent upon appellants to show that they were injured by the failure to credit the land with said payments. To the contrary the finding is that the inequalities were adjusted and that appellants were charged with no more than their just proportion of the cost of reclamation.

It also appears that if the writ were granted, appellants would gain an advantage over other land owners who have already been charged with an excess amount to equalize the burden. "*Mandamus* will not lie where its effect would be inequitable or unjust as to third persons or will introduce confusion or will not promote substantial justice." (*Board of Education v. San Diego*, 128 Cal. 369, [60 Pac. 976].)

At any rate, appellants, in effect, have been given credit for the principal of their payments, and the only consideration of which they could complain is that interest on said payments was not regarded in equalizing said assessments, and this was probably the consideration that Judge Shaw had in view in making the suggestion hereinbefore quoted. But they made no such demand on the treasurer nor is there any intimation in this proceeding that they desire such credit. They claim that they are entitled to credit for *principal* and *interest* and upon that claim they have elected to stand or fall.

There is another view which, in my opinion, although not argued by counsel, is fatal to the claim of plaintiffs. While the language of the original section is that payment shall be credited "to the tract of land on which the same was paid," yet it is true as declared by the supreme court in *Reclamation District v. Bonbini*, 158 Cal. 206, [110 Pac. 580], that "the whole object and scheme of section 3466½ of the Political Code was to provide for reimbursement of those who may

have paid the amounts assessed against their lands where such lands were not liable therefor because of the invalidity of the assessment against them."

Plaintiffs herein did not pay said assessment, and hence the occasion does not call for reimbursement. It was paid, as we have seen, by the former owners of the property, and there is nothing to show that appellants expended a dollar therefor, or incurred any liability in consequence of it. It does not appear that the land cost them any more than if said assessment had not been paid by the Dangers brothers, or that said circumstance entered at all into the consideration for said purchase. In other words, we must assume that the plaintiffs are in exactly the same situation financially as though said payment had not been made by the former owners. In that view of the case, it would appear plain that no injury to plaintiffs has been shown.

Moreover, we think the said section 3466½, as amended, is the law applicable to the case, and that it cannot be said that there has been a destruction or impairment of any vested right.

Appellants call attention to the fact that several sections of the Political Code were amended at the same time as said section 3466½ in 1911, among them being section 3478 of said code. The last made said amendment applicable to all reclamation districts, with three exceptions or provisions, as follows: 1. "Any proceeding which shall have been already commenced for the levy or collection of assessments in such district when this section takes effect." 2. "Any act done or performed in relation to the affairs of such district prior to such last mentioned date." And 3. It shall not affect "the indebtedness of such district theretofore incurred excepting as to the method of liquidating such indebtedness." Only by virtue of these provisions could it be said, if at all, that the amended section does not control said Spurrier assessment. But without a specific analysis of these provisions it is sufficient to say that said assessment involved "the method of liquidating the indebtedness of the district," and, therefore, the amended statute is expressly declared to be applicable to such a case.

The inquiry as to whether there was in plaintiffs, or the former owners of the land, any vested right to said credit

leads to the consideration, as suggested by respondent, of the nature of a reclamation district, the character of the obligation created by assessments, and the relation between the district and the land owner as to the assessment and its payment.

These districts are undoubtedly "governmental agencies to carry out a specific purpose." (*Reclamation District No. 7 v. Sherman*, 11 Cal. App. 407, [105 Pac. 277].) And the local assessment levied in return for the benefits conferred upon the property assessed by the improvements for which the assessment is levied is a species of tax. (Cooley on Taxation, p. 416.) It is true that the method of apportionment in the local proceedings is different from that involved in the general burdens imposed by taxation for state and municipal purposes, but in each case the assessment is an exercise of the taxing power.

Taxes are not debts, nor founded upon contract, but they are charges upon persons or property to raise money for public purposes. (*Perry v. Washburn*, 20 Cal. 318.)

A swamp-land assessment is a charge imposed upon property by authority of the legislature, and the fact that it is only a lien upon the property assessed and not a direct charge against the owner is immaterial. (*People v. Hulbert*, 71 Cal. 72, [12 Pac. 43].)

The levy of a street assessment is based upon the governmental power of taxation. (*Hornung v. McCarthy*, 126 Cal. 17, [58 Pac. 303].)

The legislature must originate the power to tax and prescribe the rules under which taxes are to be levied, but the determination of the amount, even of a state tax, may be referred to some other authority. The amount of the local taxes is determined in various ways. In some cases they are fixed by the legislature or under its direction and in other cases they are determined by local boards, which exercise a quasi-legislative authority. (*Bixler v. Board of Supervisors*, 59 Cal. 698.)

The courts are very generally agreed that the authority to require the property specially benefited to bear the expense of local improvements is a branch of the taxing power or included within it. (*French v. Barber Asphalt Paving Co.*, 181 U. S. 324, [45 L. Ed. 879, 21 Sup. Ct. Rep. 625].)

"A tax is an enforced contribution for the payment of public expenses. It is laid by some rule of apportionment

according to which the persons or property taxed share the public burden, and whether taxation operates upon all within the state, or upon those of a given class or locality, its essential nature is the same." (*Houck v. Little River Drainage District*, 239 U. S. 266, [60 L. Ed. 266, 36 Sup. Ct. Rep. 58].)

These assessment charges are based upon the benefit which accrues to the property by reason of the improvement, and, therefore, the liability therefor persists against the property until some suitable legislation is enacted which will enable the governmental agency to enforce the same. (Page and Jones on Taxation by Assessment, sec. 958.)

Hence, if an illegal tax is voluntarily paid, no recovery in the absence of statutory authority will be permitted. (*Justice v. Robinson*, 142 Cal. 199, [75 Pac. 776].)

The method of levying taxes is a question of legislative policy, and there exists no contract between the taxpayer and the legislature that the same policy will be continued and that the method of levying taxes will not be changed. (*Bailey v. Maguire*, 22 Wall. 215, [22 L. Ed. 850].)

Herein, the legislature, in amending section 3466½, changed the policy of levying reassessments in reclamation districts, and this did not, for the reasons heretofore stated, deprive appellants or their predecessors in interest of any contractual right. The case, relating as it does to the method of taxation for the promotion of a governmental purpose, does not involve section 10 of article I of the constitution of the United States or section 16, article I, of our state constitution, which plaintiffs claim would be violated if section 3466½, as amended, is to be applied to the situation.

Of course, it cannot be said that the law "impairs the obligation of a contract" if there was no contract between the state and the owners of the land.

The broad ground upon which the United States supreme court declares the authority of the legislature to change the law rests is that the law-making power "is not making promises, but framing a scheme of public revenue and public improvement," and where it announces its policy by the enactment of a statute, "it may open a chance for benefit to those who comply with its conditions, but it does not address them and therefore makes no promise to them. It simply indicates a course of conduct to be pursued until circumstances or its

views of policy change. It would be quite intolerable if parties not expressly addressed were to be allowed to set up a contract on the strength of their interest in, and action on, the faith of a statute, merely because their interest was obvious and their action likely, on the face of the law." (*Wisconsin v. Powers*, 191 U. S. 379, [48 L. Ed. 229, 24 Sup. Ct. Rep. 107].)

Moreover, assuming that a question of vested interest might arise under the application of said sections of the code, still this case must fail, since it was a mere expectant or contingent interest at the time of the amendment of the statute. Such rights are contingent when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting. (*Pearsall v. Great Northern Ry.*, 161 U. S. 673, [40 L. Ed. 838, 16 Sup. Ct. Rep. 705].)

The section prior to said amendment provided that before credit should be given three circumstances must exist; first, an invalid assessment; second, payment before judgment of invalidity, and third, judgment of invalidity. The invalid assessment was paid in 1909; the amended statute became a law on April 5, 1911, but the judgment of invalidity was not entered until May 11, 1911, or after the repeal of the statute providing for the credit. The interest was not vested, therefore, and it ceased with the repeal of the statute. (*Anderson v. Wilkins*, 142 N. C. 154, [9 L. R. A. (N. S.) 1145, 55 S. E. 272].)

The right to credit for such payment is purely statutory. Hence, being *in fieri* at the time of the repeal of the statute, it ceased with such change in the law. The subject is thoroughly discussed in *Moss v. Smith*, 171 Cal. 777, 788, [155 Pac. 90], and we think the principle set forth therein is applicable to the present situation.

We conclude that in any event appellants have shown no injury or prejudice, and, besides, no reason exists for holding that the state entered into a contract with them, binding itself to give them credit for such payment, and, finally, that if the statute did create a right or interest that under certain contingencies could not be destroyed by subsequent legislation, such right or privilege being purely statutory and not being vested, fell with the law that gave it birth.

Other considerations might be suggested for an affirmance of the judgment, but we think the foregoing sufficient, and the judgment is affirmed.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 26, 1918.

---

[Civ. No. 2343. First Appellate District.—June 23, 1918.]

**D. C. DUTTON, Respondent, v. WILLIAM LOCKE-PADDON, Appellant.**

**DEED OF TRUST—GRANT OF REAL PROPERTY—ASSUMPTION OF PAYMENT—EVIDENCE—COVENANT IN GRANT DEED.**—An agreement on the part of the grantee of real property encumbered with a deed of trust to pay the note secured by the trust instrument is sufficiently proven by the existence of a covenant to that effect in the deed of the grantee and his recognition of its existence.

**ID.—ASSUMPTION OF DEBT—NATURE OF PROMISE.**—It is not necessary that there should be any formal promise on the part of the grantee of mortgaged premises to pay the mortgage to render him liable therefor if his obligation so to do appears from a consideration of the entire conveyance; it may be made orally or in a separate instrument, or it may be implied from the transaction between the parties, or it may be shown by the circumstances under which the purchase was made, as well as by the language used in the instrument.

**DEED—CHANGE OF NAME OF GRANTEE—CONSENT OF GRANTOR.**—A deed is not void by reason of the substitution therein after its signing and acknowledgment, but before its delivery, of the name of a different grantee, where such substitution is made with the consent of the grantor.

**APPEAL** from a judgment of the Superior Court of Alameda County. J. J. Trabucco, Judge Presiding.

The facts are stated in the opinion of the court.

J. L. Smith, for Appellant.

Snook & Church, for Respondent.



KERRIGAN, J.—This is an appeal from the judgment in an action brought to recover the amount of a deficiency arising under a sale of real property by virtue of a deed of trust given to secure the payment of a certain promissory note.

Very briefly, the essential facts of the case are these: In the month of April, 1915, A. W. Morey owned a certain piece of real property which stood in the name of M. McDonough. At that time Morey was or became indebted to the plaintiff D. C. Dutton in the sum of \$1,250, whereupon, at the instance of Morey, McDonough gave to plaintiff his promissory note in that amount secured by a deed of trust to said property. Thereafter, at the request of Morey, McDonough signed and acknowledged a deed conveying said property to Ella B. Morey, the wife of A. W. Morey, and wherein there was a covenant to the effect that the grantee assumed payment of said note. Ella B. Morey was not informed of the execution or existence of this deed and it was never delivered to her. Shortly after it was made Morey agreed to a trade of the land with William Locke-Paddon, the appellant herein, but instead of causing a new deed of the land to be made, he, with the consent of McDonough, altered this deed made to his wife by inserting in place of her name the name of appellant, and as so altered he delivered the deed to the appellant. The note secured by the deed of trust not being paid when due, the trustee sold the land under the terms of the trust, and after payment of the expenses of the trust the balance received from the sale was credited by plaintiff upon his note, leaving a deficiency, to recover which this action was brought.

The evidence abundantly supports the finding of the court that the appellant agreed to assume payment of the obligation secured by the deed of trust. From the circumstance that a covenant to that effect appears in his deed he is presumed to have had knowledge of its existence from the time he accepted that instrument. It was also shown that he had actual knowledge that such covenant was contained in his deed, and that the holder of the obligation intended to look to him for its payment. He not only accepted the deed burdened with this covenant, but on several occasions treated with the plaintiff concerning phases of the transaction on the basis that this covenant was contained in the deed. In a word, and as before stated, the evidence shows clearly by the

conduct of appellant that he assumed the payment of the note for which the trust deed had been executed.

In an action like this it is not necessary that there should be a formal promise on the part of the grantee to pay the obligation encumbering the land conveyed in order to render him liable therefor if his obligation so to do appears from a consideration of the entire conveyance. "The obligation may be made orally or in a separate instrument; it may be implied from the transaction between the parties, or it may be shown by the circumstances under which the purchase was made, as well as by the language used in the instrument." (*Hopkins v. Warner*, 109 Cal. 133, [41 Pac. 868]. See, also, *Lick v. Anderson*, 29 Cal. App. 491, [156 Pac. 70].)

The only other point in the case seriously urged by the appellant is one concerning the effect of the alteration of the deed whereby the name of the appellant was substituted for the name of Ella B. Morey. As to that point, while it may be said that the method pursued was unusual, it cannot for that reason be said that the deed is void. The paper not having been delivered to Mrs. Morey conveyed no title to her, and was, considered as a conveyance of real property, no better than a blank form. The erasure of Mrs. Morey's name and the insertion in its place of that of the appellant was not the alteration of an instrument, since the instrument had not yet been created. It was merely equivalent to filling in a blank form, although one a little more complete than is usually the case. Morey, the real owner of the property, delivered the deed to appellant with the intention thereby to pass title, and in our opinion it had that effect. As to whether or not there should have been a reacknowledgment of its execution need not here be considered, as that question refers to its status considered from the point of view of its right to recordation, with which we are not at present concerned.

The judgment is affirmed.

Beasley, J., *pro tem.*, and Zook, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 26, 1918.

[Civ. No. 2696. Second Appellate District.—June 28, 1918.]

EGBERT VAN ALLEN et al., Petitioners, v. SUPERIOR COURT OF LOS ANGELES COUNTY et al., Respondents.

**RECEIVER—APPOINTMENT UPON EX PARTE APPLICATION—FAILURE TO REQUIRE BOND—VOID ORDER.**—An order appointing a receiver in an action for the foreclosure of a mortgage without requiring the undertaking provided by section 566 of the Code of Civil Procedure is void, notwithstanding the default of the defendants, where there were no allegations in the complaint upon which a receiver could have been appointed, and no notice given the defendants of the application for the appointment.

APPLICATION for a Writ of Prohibition originally made to the District Court of Appeal for the Second Appellate District to restrain the Superior Court from punishing the petitioners for contempt of court. Grant Jackson, Judge.

The facts are stated in the opinion of the court.

Charles L. Evans, for Petitioners.

D. H. Parke, for Respondents.

**WORKS, J., pro tem.**—In a certain action in the superior court, brought for the foreclosure of a mortgage, in which the petitioners here were defendants, an order was made, after decree of foreclosure, appointing the respondent Kinney a receiver to take possession of the property mentioned in the decree. The receiver endeavored to take possession but the petitioners refused to surrender it, and were cited to show cause in the superior court why they should not be punished for contempt. They are here on a petition for a writ of prohibition preventing the respondent court from so punishing them.

It is contended by the petitioners that the order appointing the receiver is void on various grounds, but one only of them need be considered. The petitioners defaulted as defendants in the foreclosure action, but there were no allegations in the complaint upon which a receiver could have been appointed. No notice was given the petitioners of the appli-

cation for the appointment of a receiver. Therefore, considering the form of the complaint, and notwithstanding the default of the petitioners, the application was an *ex parte* one. Section 566 of the Code of Civil Procedure provides: "If a receiver is appointed upon an *ex parte* application, the court, before making the order, must require from the applicant an undertaking, . . . to the effect that the applicant will pay to the defendant all damages he may sustain by reason of the appointment of such receiver. . . ." In the present instance no such bond was required or given either before or after the appointment of the receiver. The order was void. (*Stoff v. Erken*, 172 Cal. 481, [156 Pac. 1033].)

A peremptory writ of prohibition will issue restraining the respondent court from punishing the petitioners for contempt.

Conrey, P. J., and James, J., concurred.

---

[Civ. No. 2398. First Appellate District.—June 29, 1918.]

W. C. RAISCH, Appellant, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA (a Corporation), Respondent.

**STREET LAW—ASSESSMENT—STATE UNIVERSITY LAND.**—Before land, a portion of which is actually in use by a state university for educational purposes, may be subjected to the lien of a street assessment, it must be separable from the remainder of the property for the public use of which it is a part without impairing the value of the property for the public use to which the occupied portions of it are already put.

**ID.—STRIP OF LAND FORMING PART OF UNIVERSITY BLOCK—NONLIABILITY FOR STREET ASSESSMENT.**—A strip of land fronting on a street and forming about one-seventh of a block owned by the state university, six-sevenths of which is occupied by college buildings, is not separable from the remainder without impairing its use, and therefore cannot be subjected to the lien of a street assessment.

**ID.—ASSESSMENT WHOLLY VOID.**—An assessment of a block of land belonging to the state university for street improvement is wholly void where six-sevenths of the block is occupied by college buildings.

**ID.—ASSESSMENT OF NONASSESSABLE LAND—WAIVER AND ENFORCEMENT OF LIEN AGAINST OTHER LAND NOT PERMISSIBLE.**—Where an assess-

ment of a block of land for street improvement was void, because six-sevenths of the land was occupied by college buildings of a state university devoted to public use, and therefore not subject to assessment, the contractor cannot waive his lien as to the six-sevenths and enforce it against the one-seventh.

ID.—INVALIDITY OF ASSESSMENT—FAILURE TO PROTEST TO COUNCIL—PROPERTY OWNER NOT ESTOPPED.—A property owner is not estopped from asserting the invalidity of a street assessment because he failed to protest to the city council or because he remained silent while the work was being done.

APPEAL from a judgment of the Superior Court of the City and County of San Francisco. J. M. Seawell, Judge.

The facts are stated in the opinion of the court.

C. H. Wilson, for Appellant.

Warren Olney, Jr., for Respondent.

BEASLY, J., *pro tem.*—The regents of the University of California were, on April 1, 1911, and still are, the owners of an irregular shaped block of land in the city and county of San Francisco, bounded by First Avenue, Parnassus Avenue, Kirkham, sometimes called K, Street, and Fourth Avenue, embracing about thirteen and one-half acres of land. Raisch, a street contractor, did street work, consisting of grading and sewer construction, on Fourth Avenue along the entire front of the university property, and also upon the intersections of that avenue with Kirkham Street and Parnassus Avenue. This work was done under a resolution of intention of the board of public works, providing for the assessment of its cost on property fronting on the improvement. Legal steps followed leading to an assessment for the cost of all this work. The entire tract of land belonging to the university was assessed to pay \$3,681. The entire tract having been so assessed, the plaintiff in his amended complaint sought to foreclose not upon the whole of the university's property, but upon the Fourth Avenue frontage to a depth of 120 feet only.

The trial court sustained defendants' demurrer to the amended complaint, raising questions hereinafter discussed, and entered judgment for defendants when plaintiff refused to further amend. From that judgment the plaintiff appeals.

The plaintiff concedes that the assessment is void against all of the university property except that portion upon which he now seeks to foreclose. The reason which exacts this concession from the plaintiff is that all of the block except that portion last referred to is used by the regents in the performance of their public functions; but the plaintiff contends that the strip fronting on Fourth Avenue to a depth of 120 feet is not so used by the regents, and that it, therefore, should be subjected to his lien as prayed. The plaintiff attempted to frame his amended complaint so as to state a cause of action within the rule of *City Improvement Co. v. Regents*, 153 Cal. 776, [18 L. R. A. (N. S.) 451, 96 Pac. 801]. In that case the rule was stated to be that the regents, being a private corporation charged with the public trust of the general government and superintendence of the University of California, "private property held by them when actually devoted to public use is exempt from taxation for street improvement; otherwise not." And it is said that "the principle is well established that where any such lands are not directly and necessarily used for a public purpose, they may be subjected to the payment of special assessments for benefits." Much other learning is embodied *arguendo* in that opinion, which is by Mr. Justice Henshaw; but the above statement is the simplest and, as to the defendants' position, the most favorable statement of the rule to be found in the case. An examination of the record in that case indicates that the property there assessed was an entire lot held and devoted, as therein alleged, solely to private uses of the defendants; that it was entirely vacant and unoccupied; not actually nor necessarily incidental nor appropriated to the performance of any public function, and not directly nor necessarily used for any public purpose. Allegations to similar effect are embodied in plaintiff's complaint as to the property affected in this case; and plaintiff seems to concede that before land, a portion of which is actually in use by the university for educational purposes, may be subjected to the lien of an assessment for street improvement, it must be separable from the remainder of the property for the public use of which it is a part without impairing the value of the property for the public use to which the occupied portions of it are already put; for he has alleged that the 120 foot strip is not an indivisible portion of the block described in the assess-

ment, but, on the contrary, is easily divisible therefrom, and when severed will in no way affect the value or use of the remainder of said land for a public purpose or the performance of a public function.

It goes without saying that this allegation was necessary to a statement of a cause of action by plaintiff; for, if the land sought to be subjected to the assessment, and to be sold in a foreclosure proceeding to pay the same, is not divisible from the remainder of the tract without injuring it for the uses to which the university is devoting such remainder, then, of course, the portion sought to be severed is necessary to the use of the remainder of the tract.

Now, in the view we take of this matter, these bald allegations of this complaint, avowedly made for the express purpose of bringing the case within the rule of the case cited, cannot change the patent facts which appear on the face of the complaint itself. It is conceded in the brief of appellant that the whole eastern portion of this block—more than six-sevenths of its area—is occupied by the buildings of the Affiliated Colleges of the University of California. To allege under such circumstances that the other one-seventh of the area is severable and not necessary to the use of the remainder, considering the admitted character of the actual present use of almost the entire property, does not make it so. It is plain that the severance of this frontage on Fourth Avenue from the remainder of the property would necessarily impair the present as well as the future usefulness and value of the remainder of the block to the university for its public purposes; and the point of view from which this question must be examined is upon the assumption that the strip is to be sold to satisfy the lien, and thus severed from the remainder of the tract.

When the case of *City Street Improvement Co. v. Regents*, *supra*, was decided, the supreme court had before it no question of the division of a parcel of land upon which, and covering and using nearly all of which, as here, were buildings of the university. Upon this ground alone, then, the cases are distinguishable, and the demurrer was properly sustained.

There is, however, another ground upon which the trial court correctly sustained the demurrer.

It is, as indeed it must be, conceded by appellant, under *Witter v. Mission School District*, 121 Cal. 351, [66 Am. St.

Rep. 33, 53 Pac. 905], that the assessment as to the six-sevenths of this block in actual occupation—adopting counsel's construction of that term as meaning occupied by buildings in use for university purposes—was void. But the supreme court has gone further than this, and has held that where a street assessment covered too much land, the whole assessment was void; and in *Benson v. Bunting*, 141 Cal. 462, [75 Pac. 59], Mr. Justice McFarland stated the rule in this language: "Appellant contends that he should have been allowed the amount of an alleged street assessment against the land which assessment the court found to be void. (*Ryan v. Altschul*, 103 Cal. 177, [37 Pac. 339].) We do not see that the court erred in so holding. The assessment was against too much land, and therefore void; and it is unnecessary to consider respondent's contention as to the insufficiency of the engineer's certificate."

It is argued that in these cases the assessment was upon lands not only not assessable for the improvement, but belonging to other parties than owners of assessable lands; and that therefore those cases are distinguishable from the case at bar. We find nothing to indicate such a state of affairs in the case of *Benson v. Bunting*, 141 Cal. 462, [75 Pac. 59]; and, further, the supreme court applied the same rule in the case of *Parker v. Reay*, 76 Cal. 103, [18 Pac. 124], where an assessment for street work was levied against a lot known as lot No. 13, when it should have been levied against only the easterly half of that lot. This assessment also was declared void because it included too much land, and it does not therein appear that the assessable and nonassessable parts of lot 13 belonged to different parties.

Counsel for the appellant meets these cases with the contention that the basis of the assessment is the frontage only without relation to the depth of the lot; and hence the enforcement of a lien on the shallow frontage in this foreclosure suit does not injure the defendants, and that they may not complain, and depends for support of this contention upon the case of *Diggins v. Hartshorne*, 108 Cal. 154, [41 Pac. 283]. In the opinion in that case it is said that the owner cannot be said to be aggrieved merely because the superintendent, while correctly giving the frontage of his lot and assessing the proper amount thereto, has incorrectly delineated its interior lines, since the amount of the assessment is in no wise



affected thereby. And it is further said that the basis of the assessment is the frontage upon the work, and the frontage of each lot determines the amount of the assessment against a lot irrespective of its size, shape, or depth.

But the main question in that case was as to the proper location of Channel Street, in San Francisco. The court having settled the proper location of Channel Street, used the language above referred to. This language must be read in the light of the facts which were before the court. Those facts are thus stated in the opinion: "The appellant does not contend that if Channel Street is properly located on the diagram any other property than that designated therein is assessable. His contention in this respect is based upon his claim that Channel Street is erroneously located thereon. The precise distance from Berry Street at which Channel Street is laid down on the maps named in the statute has never been officially declared, and the different measurements given at the trial were reached by measurement with a scale. One of these distances was less and the others more than is shown upon the diagram. These discrepancies, however, do not of themselves invalidate the assessment. They are ascertained only by evidence outside of the assessment itself, and in such a case the assessment is not *felo de se*, but, if defective, is to be remedied upon an appeal."

It is apparent that all that the court intended to hold in that case was that if errors were made by the street superintendent in delineating the depth or lateral lines upon the assessment map, such errors were trivial, and could have been cured by an appeal to the supervisors. We undertake to say that the court did not mean that an assessment should be upheld in a case where, without mistake but intentionally, the assessment embraced a tract of land with a depth of approximately eight hundred feet, an area of thirteen and one-half acres, and of which only 120 feet in depth on one front could be legally assessed. That the court did not intend that the language referred to should be given the meaning attached to it by appellant is clear from the following statement from the opinion: "It is only the land assessed which is subject to the lien, and the judgment directing the sale, as well as the complaint for its foreclosure, must be limited to the description of the lot as found in the assessment."

Adopting further the language of *Diggins v. Hartshorne*, *supra*, as applicable to this case (in which we think he is mistaken), counsel contends that the basis of the assessment here is the frontage upon the work; that the frontage of each lot determines the amount of the assessment against that lot irrespective of its size, shape, and depth. Viewed from the standpoint of the state of this proceeding at the present time there seems to be much force in this argument, for this is a front-foot proceeding, and such is the rule as to the method of levying assessments in front-foot proceedings. Nevertheless, the statement is not correct in the sense that the frontage was all that the board of public works was permitted to consider when the proceeding was instituted and the method of assessment determined. To so hold would be to lose sight of the relative cost of the improvement compared to the value of this property, and of the legal principle that the assessment must not be confiscatory, and that fundamentally, in all cases of assessments for local improvements, the taxing powers must not levy a tax that will be so disproportionate to the value of the property to be subjected thereto as to deprive the owner of his property without due process of law. The board of public works, at the inception of this proceeding, and while considering the method to be adopted for raising the money with which to do this work, had the right, if it was not their duty, to consider the value of the taxable portions of the property assessable for the work. The board of public works had at least two distinct methods provided by law for raising this money. It could, as it attempted to do here, levy the assessment upon the frontage; but it was also provided by an amendment to the charter of the city and county of San Francisco, adopted in 1910 (Stats. 1911, p. 1691, art. VI, c. II, sec. 33), that the city might proceed with street improvements under the general street law of the state, which at that time included the Vrooman Act, [Stats. 1885, p. 148], section 3 of which then authorized street improvement under what is known by the common name of the district plan. In that section of the Vrooman Act it is provided that whenever, according to the estimates of the engineer, the total estimated cost and expenses of a street improvement will exceed one-half of the total assessed value of the lots and lands assessed, if assessed, as here, upon the frontage, according to the last assessment-roll of the city, the district plan must be

adopted. While the city was not bound under the charter, as a municipality organized under the General Municipal Incorporation Act [Stats. 1883, p. 93] would have been, to follow this district plan in such a contingency, nevertheless it might have done so, provided the cost would exceed one-half the assessed value of that portion of the property assessable and fronting on the street. It must be clear from this that the city and county at the beginning of this proceeding were permitted to take into consideration not only the extent of the frontage, but also the value of the property back of the frontage; and where, as here, the value of the 120 foot strip does not appear, we are not called upon to assume, in order to reverse this judgment, that the board of public works would not have been warranted, and would not, under the circumstances that existed here, have adopted the district plan had its attention been called to the fact that its assessment against the six-sevenths of the property on which the buildings stand was void.

Counsel contends that plaintiff has the right, by waiving his lien to the remainder of the property—as he expressly undertakes to do by an allegation of his complaint—to foreclose against the 120 foot strip. We think this contention unsound, for the reason that the appellant in this case is waiving nothing, even in his own view of the case, by foregoing a right to foreclose upon the six-sevenths of this property upon which he confessedly can have no lien, and which admittedly was not subject to this assessment. What is really being attempted is to collect by this indirect method an invalid assessment which the board of public works evidently thought would be of benefit to the entire property of the Affiliated Colleges, and the cost of which they assumed would be levied upon that entire property measured by its frontage on Fourth Avenue. They were mistaken in this; and had they known of their mistake it is not possible to say at this time that they could have levied this assessment at all. What is really asked of the court here is to make a new assessment for this street contractor, or that he be permitted to make a new one for himself, which the respondents in this case will have no opportunity to protest. While they were not called upon to protest the actual assessment in order to protect their rights in the courts, they had, nevertheless, the right to do so, and they cannot now be compelled by the court to face,

without the power to protest, a new assessment entirely different, so far as the property is concerned, from the assessment actually levied.

At the oral argument appellant's counsel contended that the "equities" of the case were all with appellant; that the respondents had stood by and permitted the appellant to expend his money on improvements in front of respondents' property without protest or objection, and should not now be heard to question the legality of the assessment. There is nothing in the complaint in this action to sustain this contention. It does not appear from the complaint that no protest was made, or that no objection was offered; and, further, in the case of *Barber Asphalt Paving Co. v. Jurgens*, 170 Cal. 273, [149 Pac. 560], the supreme court held that a property owner is not estopped from asserting the invalidity of an assessment because of his failure to protest to the city council, or because he remained silent while the work was being done. The principle there enunciated applies to this case. City officials when levying assessments act constantly under the advice of their attorneys; and the language of the case last cited to the effect that the presumption of knowledge of the previous acceptance of the street, and consequent invalidity of the assessment, did not attach to the property owner with any greater strength than it applied to the city or the contractor, is an apt response to the contention of counsel that the regents should be estopped from asserting the invalidity of this assessment if they remained silent while the work was being done.

We feel, in conclusion, that the language of the late Judge Seawell when he sustained the demurrer is appropriate in this case. He said: "I do not understand upon what theory the plaintiff can expect to have the lien enforced over this limited area, the assessment covering a much larger one."

The judgment is affirmed.

Kerrigan, J., and Zook, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 26, 1918.

[Civ. No. 2541. Second Appellate District.—July 1, 1918.]

**ROSEDALE CEMETERY ASSOCIATION (a Corporation), Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION et al., Respondents.**

**WORKMEN'S COMPENSATION ACT—REMOVAL OF CONCRETE FOUNDATIONS—STATUS OF INJURED PERSON—EMPLOYEE AND NOT INDEPENDENT CONTRACTOR.**—A person engaged by a cemetery corporation to remove from its property, by the use of explosives and blasting, some concrete foundations, is an employee and not an independent contractor, and therefore entitled to compensation for injuries received in the course of the work, where he was paid by the day and there were no restrictions placed upon the power of the corporation to direct and control his operations at will.

**ID.—EMPLOYMENT IN USUAL COURSE OF BUSINESS.**—The employment by a cemetery corporation of a person skilled in the work of blasting and in the handling of explosives used in the conduct of blasting operations, to remove by the use of explosives and blasting certain concrete foundations, while casual, is in the usual course of the corporation's business.

**ID.—VIOLATION OF BLASTING PERMIT—EXCESSIVE CHARGES OF DYNAMITE—MISCONDUCT WHEN NOT WILLFUL.**—The violation of the terms of a permit granted by a municipal corporation in the use of dynamite for blasting purposes is not willful misconduct, in the absence of evidence that such violation proximately or remotely caused the injury.

**APPLICATION for a Writ of Review** originally made to the District Court of Appeal for the Second Appellate District to annul an award of the Industrial Accident Commission.

The facts are stated in the opinion of the court.

Williams & Williams, and Goudge, Robinson & Hughes, for Petitioner.

Christopher M. Bradley, for Respondent.

**WORKS, J., pro tem.**—It is sought by the petitioner to annul an award of the respondent whereby one Armstrong was allowed compensation for injuries suffered by him while in the rendition of certain services to the petitioner. Arm-

strong was skilled in the work of blasting and in the handling of explosives used in the conduct of blasting operations, and was engaged by the petitioner to remove from its cemetery property, in that manner, certain concrete foundations which had formerly supported some discarded water-tanks once used in connection with irrigation. It was in the prosecution of this work that Armstrong was injured.

The respondent found from the facts before it that Armstrong was an employee of the petitioner, and this finding is assailed as being without support in the evidence, the contention of the petitioner being that the injured man was an independent contractor in the performance of the service for which he had been engaged. There was no written agreement evidencing the employment of Armstrong. He testified that the conversation by which he was engaged took place between him and the superintendent and the secretary of the petitioner. These officers desired Armstrong to state to them the probable cost and duration of the work in contemplation. He answered that it could be done in a week and that the expense would depend upon the cost of powder. This figure he was asked to procure and he was also to order the requisite amount of the explosive for the work. Under an ordinance of the city of Los Angeles it was necessary that a permit be secured from the city authorities allowing the work of blasting to be done. Armstrong was told by the superintendent to procure this permit, and he did so. Armstrong testified, as to his status in doing the work, as follows: "And then as to my part of the work it was talked of my taking a contract and I said I couldn't take a contract because I didn't know what I was up against, but that I would go out there and work for five dollars a day to take it out, and that they were to furnish me help to dig out what digging was to be done and give all the help necessary so as to be able to take it out within a week's time." Under this phraseology, it is a matter of some difficulty to determine the nature of Armstrong's employment. There are some features of the statement indicating that he was to be only an employee, others tending to show that he was engaged as an original contractor. It does appear, however, that he was to be paid by the day, and that there were no restrictions placed upon the power of the employer to direct and control his operations at will. The undisputed evidence is that the petitioner actually exercised no direction or control over the

work during its progress. In support of its contention that Armstrong was an independent contractor the petitioner cites many authorities to the general effect that, to quote from *Green v. Soule*, 145 Cal. 96, 99, [78 Pac. 337]: "The chief consideration which determines one to be an independent contractor is the fact that the employer has no right of control as to the mode of doing the work contracted for." Whether, however, the employer has or has not such a right of control is necessarily to be determined from the contract of employment. The fact that there was no right of control cannot be predicated upon an absence of the exercise of it, in practice, if the contract in fact allows the right. The employer would be very likely to refrain from exercising a direction or control over an employee as to whom he had the undoubted right of control, merely because the employee had a greater knowledge concerning the nature of the work to be done than did the employer himself. Nothing more seems to have been the case here. There is nothing in the opinion in *Brown v. Industrial Accident Commission*, 174 Cal. 457, 460, [163 Pac. 664], which conflicts with the views above expressed, as an examination of *Anderson v. Foley Bros.*, 110 Minn. 151, [124 N. W. 987], cited in the opinion, will show. We are satisfied that the finding that Armstrong was an employee of the petitioner is supported by the evidence.

The next contention of the petitioner is that the employment of Armstrong was both casual and not in the ordinary course of the business of the employer. It is admitted by the respondent that the employment was casual, but can it be said that it was not in the usual course of the petitioner's business? According to the superintendent of the petitioner, the business in which it engaged was cemetery work. That expression may be properly defined, we believe, in the statement that it consists in the platting, grading, planting, beautifying, and maintaining a tract of land in such manner as to render it an appropriate place for the sepulture of the dead and to preserve it as such. It can make no difference whether "cemetery work" is done by means of blasting or through the use of the wheelbarrow, the spade, or the spirit-level. All these and other instrumentalities may be required to reduce a given tract, necessarily variable to some extent in character, to a proper condition for cemetery uses and to so maintain it.

The employment of Armstrong was in the ordinary course of the business of the petitioner.

The final contention of the petitioner is that Armstrong was guilty of willful misconduct in and about his work. This misconduct is alleged to have consisted of a violation of the terms of the permit granted by the city of Los Angeles. That permit was to the effect that not more than one stick of dynamite was to be used in each blasting charge. Armstrong used one and one-half or two sticks to the charge, but there is no evidence that his departure from the permit regulations in this regard either proximately or remotely caused his injury. It was necessary that such a showing be made. (Workmen's Compensation Act, Deering's Gen. Laws, Act 2144a, sec. 12 [a] [3].) Not only so, but the showing must have been made by the petitioner, for willful misconduct is an affirmative defense in these cases. (*United States F. & G. Co. v. Industrial Accident Commission*, 174 Cal. 616, [163 Pac. 1013].) In addition to the utter failure of the petitioner to introduce evidence to support the burden of proof thus cast upon it on the hearing before the Industrial Accident Commission, there was some evidence on the part of the applicant tending to show that his injury was not the result of the use of the excessive charges of dynamite.

The award is affirmed.

Conrey, P. J., and James, J., concurred.

---

[Civ. No. 1797. Third Appellate District.—July 1, 1918.]

GARABED SOBAJE et al., Copartners, etc., Respondents,  
v. P. M. SCHUBERT, Appellant.

**BROKER'S COMMISSIONS—ACCEPTANCE OF PURCHASER—ADMISSION OF ABILITY.**—Where an owner of real property accepts the offer therefor made by a person produced by the broker employed to make the sale, he thereby admits the readiness, willingness, and ability of the purchaser to consummate the sale.

**ID.—NEGOTIATION OF SALE—RIGHT TO COMMISSIONS—WHEN COMPLETE.**  
When a broker employed simply to negotiate a sale of real estate



has found a purchaser ready, able, and willing to purchase upon the vendor's terms, his right to the agreed commission is complete, and not contingent upon the consummation of the sale.

**APPEAL from a judgment of the Superior Court of Madera County. Wm. M. Conley, Judge.**

The facts are stated in the opinion of the court.

J. J. Coghlan, Harry I. Maxim, and F. A. Fee, for Appellant.

Harry Sarkisian, for Respondents.

**CHIPMAN, P. J.**—The action is for the recovery of \$650 as commissions for procuring a purchaser of certain real property. The cause was tried by the court without a jury and plaintiffs had judgment for the amount claimed by them. The appeal is from this judgment and is here on a bill of exceptions.

It is alleged in the complaint that plaintiffs are copartners under the firm name of New England Real Estate and Insurance Company; that, on or about April 15, 1916, plaintiffs "entered into the service of the defendant, P. M. Schubert, at his special instance and request as his agents to sell and dispose of the following described real property [describing it] . . . for the sum of thirteen thousand dollars, payable at the times and upon the terms and conditions agreed to and suggested by the said defendant; for which services defendant agreed in writing to pay plaintiffs therefor the sum of five per cent as commission on the said sum of thirteen thousand dollars, such commission amounting to \$650"; that plaintiffs did, on or about April 20, 1916, "procure a purchaser for the defendant's said lands, who was then and there ready, willing, and able to complete the purchase of the defendant's said real property upon the terms and conditions fixed and agreed to by the defendant with plaintiffs herein, by bringing together the said intended purchaser and the defendant and procuring from the said intended purchaser a written offer to purchase the said lands to and for defendant herein; which offer to purchase the defendant, on or about the twenty-third day of April, 1916, . . . did then and there accept and agree to make the sale"; that defendant, though often demanded to

do so, has failed and refused, and still refuses, to consummate said sale; that plaintiffs have performed all the conditions in said contract on their part to be performed.

The answer is a specific denial of the averments of the complaint. As further answer defendant sets forth a written agreement, of date April 15, 1916, signed by defendant, by which he agreed to pay to plaintiffs a commission of five per cent for effecting a sale of said land, the sale price being thirteen thousand dollars, to be paid, five hundred dollars cash and the balance in installments as set forth. This appeared to be the agreement referred to in plaintiff's complaint on which they rely. The answer then sets out what purports to be a proposal, made on or about April 23, 1916, by John Boornutian, the purchaser referred to in plaintiffs' complaint, to purchase said land upon terms and conditions fully set out, the price to be paid being the same as stated in defendant's agreement of April 15, 1916, but including some provisions not found in that agreement. This proposal was directed "to P. M. Schubert, P. O. Box No. 87, Madera, Calif." It is alleged that "defendant then and there accepted by indorsing his acceptance upon said agreement aforesaid"; that subsequently said Boornutian offered to pay defendant five hundred dollars, but did not offer any written contract for the sale of said land; that defendant "is ready and willing to carry out the terms of said contract with said Boornutian, provided the said Boornutian will pay the said sum of five hundred dollars and enter into a contract containing the usual covenants and restrictions usually contained in contracts for the sale of real estate but without giving or conferring upon the said Boornutian the right of possession except for the purposes mentioned in said agreement," which were for planting and cultivating trees and vines, etc.

The court made the following findings of fact:

"II. That on or about the 15th day of April, 1916, defendant employed plaintiffs as such copartners to sell the real property described in the complaint for the sum of \$13,000.00, and agreed to pay plaintiffs the sum of five per cent of said amount as commission, in the event that plaintiffs should obtain a purchaser ready, willing and able to purchase said property upon terms satisfactory to the defendant.

"III. That on or about the 20th day of April, 1916, the plaintiffs as such partners did procure a purchaser for said

defendant's land upon terms and conditions satisfactory to defendant, who was then and there ready, willing and able to purchase said real property upon such terms and conditions and introduced such purchaser to defendant and also procured from said purchaser a written offer to purchase said lands upon terms and conditions satisfactory to the defendant, which said offer was on the 23rd day of April, 1916, accepted by defendant."

The court also found that the averments of the answer, paragraphs 5 and 6, were true. Paragraph 5 sets forth the agreement between defendant and plaintiffs upon which plaintiffs rely. Paragraph 6 sets out the proposal of Boornutian above referred to. The court found that plaintiffs have fully performed the terms and conditions of their contract with defendant; that they have made demand upon defendant for payment of said commissions, and that defendant has refused to pay the same.

As conclusion of law the court found that plaintiffs are entitled to recover from defendant the sum of \$650 and costs.

There was evidence that defendant indorsed his acceptance of the offer made by Boornutian, the latter of whom had been introduced as a purchaser by plaintiffs; this fact is also admitted in the answer; that subsequently the parties met in the city of Madera. Witness V. K. Sarkisian, one of said plaintiffs, testified: That the parties at that meeting "endeavored to reach an agreement on terms different from those contained in the offer and acceptance, but could not do so for the reason that Schubert and Boornutian could not agree; . . . that Boornutian at such meeting declared and said that he would not buy the premises from Schubert on any other terms than the terms mentioned in the offer he had made, which Schubert had accepted, and that if Schubert refused to sell, he, Boornutian, would employ a lawyer to take the matter to court." The witness testified that effort was made to bring the parties to an agreement without result. "Finally," testified the witness, "I gave up and said to defendant, 'I have got you parties together and you have made a contract for the sale of this property. You got to pay me my commission whether you do or do not agree to different terms and conditions of sale.'" Boornutian testified that he tendered to defendant the cash payment of five hundred dollars, which defendant took and

held for fifteen minutes and then handed the money back, stating that he could not take the money.

Defendant testified that he signed the Boornutian offer in the latter's absence and that at the time V. K. Sarkisian, one of plaintiffs, told him it was only preliminary to a final contract that was to be drawn up on the payment of five hundred dollars. He testified that when Boornutian tendered the five hundred dollars he said he told Boornutian "to take the five hundred dollars to plaintiffs and sign a definite contract and it would be all right"; that no subsequent agreement had ever been presented to him; that he was ready at any time to make a sale of the land "in accordance with the terms of said commission agreement, whenever a binding contract is entered into by any proposed vendee" upon the terms of said commission agreement. Defendant made the same offer in open court: "The Court: Now, Schubert, are you willing to sell this property to this man upon the same terms contained in his offer which was accepted? A. Yes, sir, if some things in there are changed. The Court: Then you don't want to sell this property upon the terms contained in the offer and acceptance, but will sell on terms different and more favorable to yourself. Isn't that true? A. Yes, sir." The record then states: "On cross-examination this same witness admitted that the only reason why he did not complete the sale was for the reason that the time of payments had been deferred a long time and he had leased the premises and the lessee could not be moved out before the end of the cropping season of the year 1916, and that he could not make the sale unless the purchaser was willing to take the place subject to said lease."

There was no direct evidence as to Boornutian's financial ability to meet the payments called for in his proposal. But we think that his readiness, willingness, and ability were admitted by defendant to be sufficient in accepting his proposal and in accepting him as a satisfactory purchaser presented by plaintiffs. The memorandum prepared by defendant as a substitute for some of the provisions in the Boornutian offer was properly refused admission, for the reason that it changed the terms of said offer, and, though prepared by one of the plaintiffs, it was not prepared with Boornutian's knowledge or consent nor agreed to by him. Defendant's expressed willingness to enter into a contract with Boornutian, provided that con-

tract contained "the usual covenants, agreements, and penalties contained in agreements for the sale of real property," does not, it seems to us, meet the situation. The offer of Boornutian was definite in its terms and was accepted. The duty of formulating a contract in accordance therewith, if needed, was upon defendant as much as it was upon Boornutian. The answers given by defendant to the court show that the true reason for not going forward and completing the transaction was that he was, on reflection, unwilling to sell his property "upon the terms contained in the offer and acceptance."

Appellant's contention, aside from what appears above, is that the offer of Boornutian and acceptance of appellant "is but a tentative preliminary arrangement to form the basis of a contract to be subsequently entered into, all of which is apparent and satisfactorily appears from said agreement itself." It is true that the offer contemplated the happening of certain things and stipulated certain conditions. But whatever they were, appellant accepted Boornutian as a purchaser upon the conditions laid down in the offer. Plaintiffs had performed their contract by bringing the parties together and establishing the relation between them of seller and purchaser and upon terms to which they had both subscribed. Their failure afterward to consummate the sale was in no wise attributable to plaintiffs.

The law is well settled that when a broker employed simply to negotiate a sale of real estate has found a purchaser ready, able, and willing to purchase upon the vendor's terms, his right to the agreed commission is complete (*Gunn v. Bank of California*, 99 Cal. 349, [33 Pac. 1105]), and the right of the plaintiffs was not contingent upon the consummation of the sale. (*Jauman v. McCusick*, 166 Cal. 517, [137 Pac. 254].)

We think the evidence sufficient to support the findings, and as the findings sustain the judgment, it is, therefore, affirmed.

Burnett, J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 29, 1918.

[Civ. No. 2425. First Appellate District.—July 2, 1918.]

**FRITZ MAUCHLE, Respondent, v. PANAMA-PACIFIC INTERNATIONAL EXPOSITION COMPANY (a Corporation), et al., Appellants.**

**NEGLIGENCE—COLLISION WITH AUTOMOBILE OF EXPOSITION COMPANY—INJURY TO PEDESTRIAN—NEGLIGENCE OF SUPERINTENDENT OF GROUNDS—EVIDENCE—USE ON PRIVATE BUSINESS.**—An exposition company cannot be held liable for damages for personal injuries received by a pedestrian from a collision with an automobile owned by the company and negligently driven by its superintendent of grounds, where at the time of the accident the superintendent was on his way home from work, where the machine remained until taken to the grounds, where it was kept nights.

**MOTOR VEHICLE LAW—KEEPING TO RIGHT—CONSTRUCTION OF STATUTE.** The provision of the motor vehicle law (Stats. 1913, p. 648) that the person in control of any vehicle moving slowly along and upon any public highway shall keep such vehicle as closely as practicable to the right-hand boundary of the highway, allowing more swiftly moving vehicles reasonably free passage to the left, is elastic, and does not attempt to lay down a definite and rigid rule as to the distance which the slowly moving vehicle must keep from the curb.

**EVIDENCE—DISTRUST OF FALSE WITNESS—INSTRUCTION.**—The failure to instruct the jury that a witness false in one part of his testimony is to be distrusted in others is not error where the instruction is not requested.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. John Hunt, Judge.

The facts are stated in the opinion of the court.

Brittain & Kuhl, and Everett A. Ingalls, for Appellants.

Chas. O. O'Callaghan, and Edmund Nelson, for Respondent.

**THE COURT.**—Plaintiff sued the defendant for damages claimed to have been caused to him by being run down by an automobile owned by the defendant, Panama-Pacific International Exposition Company, and driven by L. I. Fulcher, the other defendant. He prevailed.

The plaintiff, while on his way home from work on the evening of October 6, 1915, was proceeding westerly on Geary

Street pushing a hand-cart of the type used about railroad stations, warehouses, and stores to move heavy boxes and parcels. Upon this truck the plaintiff had loaded some empty boxes. Proceeding westerly from Fillmore Street he kept near the curb line until he crossed Devisadero Street. From that point westerly the street, except between the car-tracks, is paved with blocks of stone. Observing no approaching car or other vehicle, and thinking to avoid the jolting of his load by the rough street, he moved over on the west-bound car track where the space between the rails was smooth. He had proceeded but a short distance westerly from Devisadero Street when he suddenly heard the purring of an automobile engine behind him, and almost at the same instant he was struck in the back and pushed over on to the hand-cart. The grade at this point is up-hill, and the car which struck him stopped within a very short space. There was some conflict of evidence as to his injuries, but it may be said that the finding that he was injured is supported by the evidence.

It is contended in behalf of the appellant corporation that there was no showing that the defendant Fulcher at the time of the accident was performing any duty which he owed to the Exposition Company, or was using the automobile with its consent or knowledge. The respondent, answering this contention, quotes the following testimony to show liability on the part of the Exposition Company:

"Mr. Nelson: Q. Mr. Fulcher, . . . on the 6th of October, 1915, by whom were you employed?

"A. The Panama-Pacific Exposition.

"Q. How long had you been employed by that company?

"A. I should say approximately two and a half years or three at that time.

"Q. From the beginning of their work?

"A. Practically.

"Q. Are you still employed by that company?

"A. Yes, sir.

"Q. What was your particular duty in that service?

"A. I was superintendent of grounds.

"Q. The automobile that has been under discussion here, was that owned by you or by the company?

"A. By the Exposition Company.

"Q. Was that used by you in the service of the company?

"A. Yes, sir.

"Q. On this particular day at the time of this occurrence you had come from the grounds, had you, of the Exposition Company?

"A. Yes, sir.

"Q. And where were you going?

"A. I was on my way home at that time when the accident occurred.

"Q. Where did you keep this automobile overnight, say, when you went home?

"A. Why, it usually worked all night, and stayed out at my house until 10 o'clock and then down to the grounds.

"Q. You were bringing it to your house on this particular night? Where were you taking this automobile?

"A. I was going home with it.

"Q. Did you have a garage at your house to keep it in?

"A. No, sir.

"Q. After you got home with it what would become of it, what would be done with it?

"A. It stood in front of my house.

"Q. And then later what would you do?

"A. My night foreman came and got it or I took it to the grounds along about 10.

"Q. That automobile was ordinarily kept on the grounds of the Exposition Company?

"A. Yes, sir.

"Mr. Nelson: That is all."

The ownership of the automobile by the Exposition Company is admitted, and the employment of Fulcher in the capacity of superintendent of grounds, as shown in the above testimony, is not disputed; but it is claimed that Fulcher, at the time of the accident, was not using the automobile within the scope of his employment nor upon any business or affair of the Exposition Company.

The foregoing testimony being the only evidence quoted in the attempt to show responsibility on the part of the Exposition Company, seems to us to fall far short of so doing. Respondent relies upon the case of *Chamberlain v. California Edison Co.*, 167 Cal. 500, [140 Pac. 25], but the employee in that case had been ordered by another employee of the company, who had the right to give him instructions, to do the thing which he was doing at the time that his negligence caused the injury to the plaintiff in that case; and the defend-



ant corporation in that case reaped the financial benefit of the work which he was performing at that time, the facts being briefly, as stated in the opinion in the case, as follows: "Sterling, the storekeeper, ordered Rosso, the chauffeur, to go to the residence of Lighthipe with the company's truck, of which Rosso was the driver, and to bring Lighthipe's motor car to the shop which the corporation maintained for the repair of its own motor vehicles. This order was obeyed, and while Rosso was towing Lighthipe's automobile, Caleb Chamberlain was injured through the carelessness and negligence of Rosso. Lighthipe's automobile was repaired at the company's shop. A bill was rendered by the corporation therefor and paid by Lighthipe." This plainly showed that Rosso was acting within the scope of his employment at the time of the accident in that case.

The respondent relies further upon the case of *Jessen v. Peterson, Nelson & Co.*, 18 Cal. App. 350, [123 Pac. 219]. In that case the injury was due to the negligence of one Nelson. The defendant was engaged in general contracting and construction work in the city and county of San Francisco. Nelson was an officer, namely, the vice-president, of the defendant company, and had the right to operate the buggy. In so operating it "he had no regular hours whatsoever. He had to go around all over the city sometimes; he had to go out to the park and Richmond, where the corporation was working at times. He had to go everywhere and see that the work was all right. From this it appears that in addition to being vice-president of the company Nelson was also general superintendent of its work, and in the performance of his duties he had a roving commission, which permitted him to look after the business of the defendant at the times and in the manner which best suited his own convenience." This presents a far different case from the relation sustained by Fulcher to the Exposition Company. The evidence above quoted does not show that Fulcher was in any way serving the Exposition Company at the time of the accident in this case; nor does it present any evidence tending to so show.

It is contended that Fulcher's use of the automobile was a convenience which enabled him to perform his duties more expeditiously in moving about from place to place where he was needed. But while this may be true, the above-quoted evidence—which we assume from respondent's brief is the only

evidence showing that Fulcher was performing duties for the Exposition Company at the time of the accident—fails completely to show that he was about the business of the Exposition Company at the time of the accident. We think the verdict not supported by the evidence so far as the Exposition Company is concerned, and as to that defendant the judgment will be reversed.

Unless it must be said that the respondent was guilty of contributory negligence in not staying closer to the right-hand curb in his journey, this judgment may not be reversed as to Fulcher. Paragraph i of section 20 of chapter 326 of the Statutes of 1913 (Stats. 1913, p. 648), has this provision: "The person in control of any vehicle moving slowly along and upon any public highway shall keep such vehicle as closely as practicable to the right hand boundary of the highway, allowing more swiftly moving vehicles reasonably free passage to the left." There is a similar provision in section 6 of Ordinance No. 1857 of the city and county of San Francisco. These provisions of the law are elastic. They do not attempt to lay down a definite and rigid rule as to the distance which the slowly moving vehicle must keep from the curb. Convenience, condition of the street, freedom of the street from other vehicles, or, on the other hand, its more or less crowded condition, must all be taken into consideration in determining the position upon the street which the slowly moving vehicle must occupy in order that the person propelling it or driving it shall be free from negligence. In this case the evidence was of such a character that we are not prepared to say that Mr. Mauchle was guilty of contributory negligence in moving along the west-bound car-track instead of keeping close up to the curb. It does not appear that there was not plenty of room for free passage by Fulcher to the left of Mauchle. Some discretion must be left to juries and trial courts in such cases; and we think in this case that we cannot hold as a matter of law that Mauchle was guilty of contributory negligence. There are other elements, such as that the night was foggy, which are urged by appellant to show contributory negligence on the part of Mauchle, but we cannot say, as a matter of law, that they do so. It is also urged that there is no evidence that Fulcher was guilty of any negligence; but the testimony of the plaintiff and other witnesses is sufficient to support the plaintiff's contention that the lights on Fulcher's machine were not

lit and that he blew no horn nor made any other sound when approaching Mauchle. An attempt is made to demonstrate that from the mechanism of Fulcher's machine his lights went out when he stopped it, and that thus Mauchle was deceived into supposing that it had no lights, whereas its lights had been burning up to the time it stopped; but the jurors were the judges as to whether this mechanical demonstration or the positive testimony of the plaintiff was true; and they accepted the positive testimony of the plaintiff that the lights were not lighted on the machine. They accepted the evidence of the witness as against the mechanical argument, and we are not in a position to determine that they were wrong.

The appellant contends that the trial court should have instructed the jury that a witness false in one part of his testimony is to be distrusted in others, as provided in subdivision 3, section 2061, of the Code of Civil Procedure. The reply is that the instruction was not asked. Counsel, however, contend that the defendants had the right to rely upon the court to give those instructions which, under the code, the court is bound to give. That section of the code, however, provides only that the court shall give this instruction as it provides that others of a similar nature shall be given—on proper occasions. We are not inclined to lay down a rule that would place upon trial judges the burden of determining that such instruction shall be given unless the request therefor is made by the party desiring it.

As to Fulcher, the judgment will be affirmed.

---

[Civ. No. 2412. First Appellate District.—July 3, 1918.]

J. MACKNIGHT, Administrator, etc., Respondent, v. J. B. DAVITT, Appellant.

**BROKER'S COMMISSIONS—CONTRACT OF EMPLOYMENT—DEFECT IN DESCRIPTION—PAROL TESTIMONY.**—In an action to recover a commission claimed to have been earned for securing the acceptance of an offer to exchange real property, it is not error to permit the plaintiff to remedy by oral testimony a defective description in the broker's contract of employment.

**CORPORATION LAW—ACCEPTANCE OF OFFER OF EXCHANGE OF REAL PROPERTY—AUTHORITY.**—A written acceptance by a corporation of an offer to exchange real property is sufficiently shown to have been made under the authority of the board of directors where the acceptance contained the signatures of the vice-president and secretary and the corporate seal.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. John T. Nourse, Judge.

The facts are stated in the opinion of the court.

tum Suden & tum Suden, for Appellant.

Pringle & Robbins, for Respondent.

**THE COURT.**—In this action to recover a commission claimed to have been earned for securing the acceptance of an offer to exchange real property, the trial court gave judgment for the plaintiff, from which judgment defendant appeals.

On the twenty-seventh day of February, 1917, plaintiff and defendant entered into a written agreement in which defendant represented himself as the owner of certain property on Eddy Street, in San Francisco, and appointed plaintiff his agent to act in negotiating an exchange of that property for certain other property on Oak Street, both properties being described in the agreement, and defendant agreed to pay plaintiff the sum of \$375 as commission when he secured an acceptance of the proposition to exchange the said property. The trial court found that plaintiff had secured an acceptance in accordance with the terms of the contract and that defendant had failed to perform his part of the agreement, and accordingly gave judgment for the plaintiff.

It is contended that the trial court erred in permitting the plaintiff to remedy by oral testimony a defective description of the property in the contract. In a contract to employ a broker to sell or exchange real estate a defective description of land can be cured by parol evidence. (*Proulx v. Sacramento Valley etc. Co.*, 19 Cal. App. 529, 534, [126 Pac. 509].) Much greater liberality is allowed in construing and curing defective descriptions in broker's contracts than in a deed of grant of land, for, so far as the statute of frauds is concerned, the terms of the employment are the essential part,

and such contracts will not be declared void merely because of a defect, uncertainty, or ambiguity in the description of the property to be sold or exchanged when such defect can be cured by the allegation or proof of extrinsic facts and circumstances. (*Maze v. Gordon*, 96 Cal. 61, [30 Pac. 962]; *Proulx v. Sacramento Valley etc. Co.*, *supra*.) The circumstances disclosed here were that Davitt represented himself in the contract in question as the owner of a "Lot on the N. line of Eddy Street, feet west from Webster Street, thence running west 53 feet and 6 inches"; that Davitt's wife then owned a lot on Eddy Street corresponding to those dimensions; that both parties to the contract understood, and intended to designate, by the description, a lot on Eddy Street beginning one hundred feet west of Webster Street, and that the figures "100" were inadvertently omitted from the description. These facts suffice, we think, to warrant a resort to parol proof to cure the defect in the description contained in the contract. (See *Anderson v. Wilstrup*, 34 Cal. App. 771, [168 Pac. 1150].)

It is further contended that it was not shown that the acceptance of the Matilda Long Estate, a corporation, was made under the authority of its board of directors, and that the trial court erred in refusing to make an order for the production of the corporation's books. The written acceptance contained the signatures of the vice-president and the secretary and the corporate seal. It is therefore to be presumed that the officers did not exceed their authority, the seal itself being *prima facie* evidence that it was affixed by proper authority. (*Southern California etc. Assn. v. Bustamente*, 52 Cal. 192; *McKee v. Cunningham*, 2 Cal. App. 684, [84 Pac. 260].) Moreover, the court ultimately admitted the written acceptance in evidence pending the production of authorities and subject to a further ruling. This in effect was a ruling subject to a motion to strike out. The record discloses that the objection to the written acceptance was not renewed and that no motion to strike out was made.

Judgment affirmed.

A petition for a rehearing of the cause was denied by the district court of appeal on August 2, 1918, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 29, 1918.

[Civ. No. 2681. Second Appellate District.—July 3, 1918.]

**HARRY W. GOODALL, Petitioner, v. SUPERIOR COURT  
OF THE COUNTY OF SANTA BARBARA et al., Re-  
spondents.**

**CONTEMPT—ANNULMENT OF UNWARRANTED ORDER—WRIT OF REVIEW.—**

An unwarranted order adjudging one guilty of contempt may be annulled upon a writ of review.

**ID.—VIOLATION OF INJUNCTION—DISMISSAL OF PROCEEDINGS—LACK OF  
GROUND—ANNULMENT OF ORDER.—**Where in a proceeding instituted by the beneficiary under a judgment granting an injunction, the disobedience of which is made to appear, the court without any ground therefor denies to such beneficiary the process of the court, which constitutes the only means of enforcing the judgment, such order should be annulled.

**ID.—AFFIRMATIVE ALLEGATIONS IN AFFIDAVIT—TRIAL.—**Affirmative allegations contained in an affidavit of the defendant in contempt proceedings for the disobedience of an injunction cannot be deemed established without a trial to determine the issues so joined.

**ID.—ACT CONSTITUTING CRIME—STATUTE OF LIMITATIONS.—**When an act sought to be punished constitutes a crime, the court may by analogy adopt the limitation prescribed by statute for criminal prosecutions.

**ID.—VIOLATION OF INJUNCTION—FLOW OF WATER—TIME FOR CONTEMPT  
PROCEEDINGS.—**The beneficiary under a judgment perpetually enjoining the obstruction of a flow of water is not barred from instituting contempt proceedings against a person violating the injunction by failure to bring the proceedings within a particular time, unless the obstruction has continued under circumstances and for a period of time from which a grant so to do would be implied.

**ID.—DELAY OF FOUR YEARS—PROCEEDING NOT BARRED BY LACHES.—**The failure to bring contempt proceedings until after the obstruction had continued for four years did not in itself constitute laches.

**ID.—RIGHT TO INSTITUTE PROCEEDINGS—MATTERS NOT AFFECTING.—**The willingness of the beneficiary under a judgment restraining the obstruction of a flow of water to waive his rights thereunder provided the person violating the judgment would pay the expense of protecting his land from overflow, and his motive in instituting contempt proceedings to compel such payment, does not affect the rights to institute such contempt proceedings.

APPLICATION for a Writ of Review originally made to the District Court of Appeal for the Second Appellate District to annul an order dismissing a contempt proceeding.

The facts are stated in the opinion of the court.

Kuster & Salisbury, and S. A. McNeil, for Petitioner.

G. H. Gould, for Respondents.

SHAW, J.—A writ of review was issued herein upon a petition wherein this court is asked to annul an order dismissing a proceeding instituted in the trial court to have one Mrs. Lora J. Moore adjudged guilty of contempt for the disobedience of a judgment enjoining her from doing the acts of which petitioner complains.

The proceeding was instituted by the filing of an affidavit setting forth the fact that in the year 1908, in a certain action wherein petitioner was plaintiff and certain persons were defendants, a judgment was rendered in favor of petitioner and against the defendants perpetually enjoining them and their assigns, as the owners of a certain tract of land, from obstructing the natural flow of water in its usual course through a certain creek that extended across said tract of land which adjoined a parcel of land owned by plaintiff; that subsequent to the date of said judgment Mrs. Moore, by mesne conveyances, obtained title to said tract of land and at all times since her acquisition thereof has been in possession of the same; that some time subsequent to June, 1913, Mrs. Moore, as owner of said tract of land through which the waters of said creek flowed, erected and caused to be erected across said stream and upon the land so acquired and owned by her certain concrete walls, dams, and bridges, by reason whereof the waters of said creek were obstructed and diverted from their natural and accustomed course and caused to back-flow upon and across the lands of petitioner, to his irreparable damage and injury; that prior to the doing of said acts, and ever since, Mrs. Moore had knowledge of the existence of said perpetual injunction enjoining her predecessors in interest in said land and their assigns from doing the acts complained of; that Mrs. Moore has at all times, with full knowledge of said injunctive order, refused to obey the same or to remove said walls, dams, and obstructions.

Upon the filing of the affidavit the court issued an order requiring Mrs. Moore to show cause why she should not be punished as for a contempt of court for disobedience of the order contained in said judgment so rendered in the action

wherein her predecessors in interest in said land were defendants. In compliance with this order she filed an affidavit, alleging affirmatively, among other things, as grounds why she should not be adjudged guilty of contempt, first, that petitioner was guilty of laches, "in this, that it appears by said affidavit that said plaintiff was cognizant of all the acts of said Lora J. Moore complained of in said affidavit for over four years before the issuance of said order to show cause"; and further, that petitioner caused to be made an estimate of the cost of labor and material which would be required in protecting his land from damage due to the obstruction of said stream by Mrs. Moore, and informed her that the cost thereof would be the sum of three thousand five hundred dollars, and demanded that she should pay said amount to plaintiff; "and affiant is informed and believes that these contempt proceedings are undertaken to enforce said payment of three thousand five hundred dollars from affiant to plaintiff." Other matters of an affirmative character, as constituting ground why defendant should not be punished for the acts committed, are averred in the affidavit. On the return day specified in said order to show cause and upon the presentation of the affidavit of Mrs. Moore, the court requested counsel for the respective parties to submit authorities upon the question of the sufficiency of the demurrer filed by Mrs. Moore, saying that in the event the demurrer was sustained, the proceedings would be dismissed, and that in case it was overruled, the matter would be set down for hearing on its merits. Thereafter the court, without further hearing, made an order as follows: "It appearing to the court that the petitioner has been guilty of laches to such an extent as to cause this court to believe that this contempt proceeding ought not to have been inaugurated, and it further appearing from the affidavit of Mrs. Lora J. Moore, and the admissions made by the attorney for the petitioner, that this proceeding was inaugurated for the purpose of compelling Mrs. Lora J. Moore to pay to the petitioner money which he claims she ought to pay to him. It is ordered that the contempt proceedings in said action inaugurated against Mrs. Lora J. Moore, named in the affidavit of Harry W. Goodall as Mrs. Laura J. Moore, be and the same is hereby dismissed."



That an unwarranted order adjudging one guilty of contempt may be annulled upon a writ of review is conceded. The converse of the rule is likewise true. Hence where, in a proceeding instituted by the beneficiary in a judgment granting an injunction the disobedience of which is made to appear, the court without any ground shown therefor denies to such beneficiary the process of the court, which constitutes the only means of enforcing the judgment, such order should be annulled, since otherwise the judgment solemnly pronounced would be an idle act.

In considering the order dismissing the proceedings we are not concerned with the affirmative allegations contained in Mrs. Moore's affidavit. Conceding the facts averred therein, if true, were sufficient to exonerate her from the charge, no trial to determine the issues so joined was had, and without such trial the affirmative allegations cannot be deemed established. (*In re Buckley*, 69 Cal. 1, [10 Pac. 69].) The grounds upon which the court made the order are, first, that petitioner had been guilty of laches; and, second, that it appeared from Mrs. Moore's affidavit "and admissions made by the attorney for petitioner," that the proceeding was instituted to compel Mrs. Moore to pay petitioner money which he claimed she ought to pay to him. As to the first ground, respondent insists that because, as shown by the petition, petitioner did not invoke the power of the court in protecting his rights until the lapse of four years after the erection of the walls and dams which obstructed the flow of water, his right to such means of enforcing the judgment is barred by laches. It is quite true that when an act sought to be punished constitutes a crime, the court may by analogy adopt the limitation prescribed by statute for criminal prosecutions. (*Gordon v. Commonwealth*, 141 Ky. 461, [133 S. W. 206]; *Beattie v. People*, 33 Ill. App. 651.) This principle, however, has no application to the instant case, for the reason that the acts complained of did not constitute a crime. The injunctive order was perpetual, and if the acts of Mrs. Moore in obstructing the flow of water in the creek continued for four years constituted a disobedience thereof, petitioner was entitled to proceed against her in contempt proceedings at any time, subject to her right to plead a continuance of the obstruction under circumstances and for a period of time from which a grant so to do would be im-

plied. Moreover, laches is an equitable defense depending upon the circumstances of each case. Conceding, but by no means holding, that in a case of this character one might, short of the time in which the law would imply a grant, lose his right to invoke the aid of the court by instituting contempt proceedings, the petition is wholly barren of any facts tending to show that petitioner was guilty of laches. As indicated in Mrs. Moore's affidavit, the delay might be fully explained by the fact that negotiations involving a continuance of the obstruction and means of protecting petitioner's property from overflow due to the same were pending for a considerable period of the four years.

The other ground upon which the order is based is that it appeared from the affirmative fact stated in Mrs. Moore's affidavit (as to which there was no proof) and admissions made by the attorney for petitioner (whether in court or on the street, is not made to appear), that the proceeding was instituted to compel her to pay to petitioner money which he claimed she ought to pay. As appears from Mrs. Moore's affidavit—and we assume counsel's admission was of like import—petitioner had expressed a willingness to waive his right to enforce the judgment upon condition that Mrs. Moore would defray the expense of constructing necessary walls to protect his property from damage due to the obstruction erected by her in the creek, which she refused to pay. Conceding this to be true and that petitioner was willing, in consideration of the payment of such sum, to forego the fruits of his judgment, neither such fact nor petitioner's motive in legally invoking the aid of the court to enforce a lawful judgment could affect his rights thereunder.

Respondent further claims that since the court had jurisdiction of the matter the making of the order, even though unwarranted, must be deemed mere error committed within the exercise of its jurisdiction, and hence cannot be reviewed in this proceeding. From the very nature of the writ, this is true where the order is based upon a conflict of evidence touching the subject. Where, however, the power to make the order depends upon the existence of facts as to which, as here, there is no evidence whatever, the question presented is one of law and subject to review by direct attack on a writ of *certiorari*. (*Great Western Power Co. v. Pillsbury*, 170 Cal. 180, [149 Pac. 35], and cases cited.) The record

discloses no evidence whatever tending to establish facts upon which the court was warranted in divesting itself of jurisdiction to try the proceeding.

The order is annulled.

Conrey, P. J., and James, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 29, 1918.

---

[Civ. No. 1740. Third Appellate District.—July 3, 1918.]

IRA CAMPBELL, Appellant, v. JOHN INGRAM, Respondent.

**WATER RIGHTS—NECESSITY FOR IRRIGATION—PLEADINGS—SPECIFIC FINDING, WHEN NOT REQUIRED.**—In an action involving conflicting claims to the waters of a certain creek, a specific finding that irrigation is necessary on the lands of the defendant is not required where it appears by the allegations and admissions of the pleadings that the lands involved are situated in an arid climate, and there is no denial of the allegation of the cross-complaint that the character of all the lands, the soil thereof, and the climatic conditions of the neighborhood are such that artificial irrigation is necessary.

**ID.—QUANTITY OF WATER NECESSARY FOR IRRIGATION—FINDING—SPECIFIC FINDING, WHEN NOT REQUIRED.**—In such an action, the failure to make a specific finding that a certain number of inches of water are necessary for the irrigation of defendant's land does not constitute reversible error where there is a finding that the amount has been used for years, without objection, for the irrigation of hay and grain and for garden purposes.

**ID.—JUDGMENT—FAILURE TO AWARD SPECIFIC AMOUNT OF WATER—WHEN NOT VOID FOR UNCERTAINTY—IMPOSSIBILITY OF DETERMINATION IN ADVANCE.**—A judgment which does not award a specific amount of water to the plaintiff, but requires the defendant to permit plaintiff to use whatever water is necessary for the use of his stock in the corral below defendant's dam, is not void for uncertainty where it is impossible to determine in advance the amount that may be required for this purpose.

APPEAL from a judgment of the Superior Court of Lassen County. H. D. Burroughs, Judge.

The facts are stated in the opinion of the court.

R. M. Rankin, and Grover C. Julian, for Appellant.

Dodge & Barry, for Respondent.

BURNETT, J.—The action involves conflicting claims to the use of the water of Beaver Creek, in Lassen County. Defendant answered plaintiff's complaint, and also filed a cross-complaint, some of the allegations of which were denied by the plaintiff. The court found that certain lands of both parties were riparian to the stream and also found:

"That in the year 1870, at a time when said William Coen was in the possession and entitled to the possession of said northeast quarter of section twenty-five (25), he entered upon said Beaver Creek at a point in the northwest quarter of section thirty (30), township thirty-seven (37) north, range six (6) east, in the county of Lassen, state of California, where all of the waters of said creek were flowing in their natural, well-defined channel, between well-defined banks, and constructed a dam in the channel of said stream, and then constructed a ditch two shovels in width and one shovel deep, and by means of said dam and said ditch diverted water from said stream to his said lands, and said William Coen and his grantors, have ever since maintained said ditch and dam and conveyed water by means thereof to said lands for the irrigation of crops of hay and grain and garden growing thereon, and for the watering of stock and for domestic purposes; and that at the time said William Coen first constructed said dam and ditch as aforesaid, the lands upon which he constructed said ditch were public lands of the United States; and said William Coen and his grantors, ever since said first diversion and appropriation of water, have continuously maintained said dam and ditch and diverted said waters for the irrigation of land in said northeast quarter of section twenty-five (25), township and range aforesaid.

"That said ditch was gradually enlarged, until the year 1901, when it was capable of conveying seventy-five (75) inches of water measured under four (4) inch pressure; and defendant has ever since said year 1901, diverted and con-

veyed seventy-five inches of water measured under a four-inch pressure, by means of said dam and ditch, from said stream to and upon the said lands of defendant for the irrigation thereof; and that in said year 1901 the grantors of the plaintiff, who were then the owners and in the possession and entitled to the possession of the lands of the plaintiff, recognized and acknowledged the right of the defendant, who was at said time in the possession and entitled to the possession of defendant's said lands, to divert seventy-five inches of water measured under a four-inch pressure, through said ditch to the above described lands of defendant; and that neither the plaintiff nor any of his grantors, down to the year 1913, ever interfered with or denied the right of defendant to maintain said dam and ditch and divert seventy-five inches of water measured under a four-inch pressure to and upon the said lands comprising the William Coen homestead."

The judgment decreed that defendant was entitled to divert from said stream by means of a dam and ditch, described in the answer and cross-complaint, seventy-five inches of water measured under a four-inch pressure for the use of a part of his land known as the William Coen homestead, and of the remaining waters of said creek the plaintiff should have fifty-three one-hundredths and the defendant forty-seven one-hundredths, and that the parties in the same proportion should pay the expense of maintaining the dam in the creek.

Appellant contends: 1. That there is no finding that irrigation is necessary on said William Coen homestead and no evidence to support such finding. 2. "There is no evidence to show or tending to show that seventy-five inches of water is necessary for the irrigation of the lands of defendant or that the continuous flow of seventy-five inches during the irrigating season has been used"; and 3. That the findings and judgment are uncertain and void, for the reason that the amount of water that defendant shall permit to flow through the dam to water plaintiff's stock in the corral below the dam is not specified.

As to the first contention, it may be said that by the allegations and admissions of the pleadings it appears that the lands herein involved are situated in an arid climate, and besides, there is no denial of the allegation of the cross-com-

plaint: "That the character of all of said lands and the soil thereof and the climatic conditions of the neighborhood in which all of the lands are situated are such that artificial irrigation is necessary." In view of this condition of the pleadings, no specific finding as to the point was required. Moreover, it is a fair inference from the findings, which were made, that irrigation is necessary in said premises, and we think there can be no doubt that the record, both as to the evidence and the determination of the court, satisfies the requirement of section 1411 of the Civil Code that the appropriation of the water "must be for some useful or beneficial purpose." We deem it unnecessary to quote the testimony in that regard. We may, however, refer to the fact that one of the witnesses testified that irrigation was necessary even for the wild hay.

There is no specific finding, nor do the pleadings admit that seventy-five inches of water are necessary for the irrigation of said tract of land, but it is found that this amount has been used by respondent for many years, without objection from appellant, for the irrigation of hay and grain and for garden purposes. From such use it would be proper to infer that it was necessary in order to produce profitable crops. Making such reasonable deductions from the facts found by the court, we find sufficient support for the judgment. It would have been more satisfactory, of course, if there had been a specific finding as to the necessity of the use, but we do not think the cause should be reversed for this defect which has not resulted in a substantial injury.

The judgment does not award a specific amount of water to the plaintiff for the use of his stock in the corral, but it does provide that the defendant has the right "to maintain said dam as the same has been heretofore maintained, and the ditch leading therefrom." And as to how it has been maintained the finding of fact is "that said dam has continuously since said date been maintained and repaired by the defendant and his grantors but in such a way as to permit water to flow through said dam sufficient for watering stock in the corral immediately below said dam."

In this respect, also, are the findings and judgment somewhat open to criticism, but, it is conceded by respondent—and we think the judgment is susceptible to that interpretation—that by the decree of the court defendant is required

to permit plaintiff to use whatever water is needed for the use of his stock in the corral, and as to that, appellant could ask for no more.

Indeed, the uncertainty in that respect is rather in favor of appellant, and respondent has the greater cause for complaint. The difficulty, if not impossibility, of determining in advance the amount that may be required for this purpose is quite apparent from the record.

Some cases bearing upon the foregoing considerations are cited by appellant, but respondent points out wherein they are not controlling here, and no reply brief has been filed by plaintiff.

Since appellant has not deigned to reply to the argument of respondent, we have a right to assume that the former deems the argument of the latter unanswerable, and we are justified in concluding, without further delay, that the judgment should be affirmed, and it is so ordered.

Chipman, P. J., and Hart, J., concurred.

---

[Civ. No. 2718. Second Appellate District.—July 5, 1918.]

REX B. CLARK et al., Petitioners, v. SUPERIOR COURT OF THE COUNTY OF LOS ANGELES et al., Respondents.

**ATTACHMENT—DISSOLUTION BY NONSUIT—DUTY OF SHERIFF.**—An attachment is *ipso facto* dissolved where an order of nonsuit is granted and entered in the minutes of the court and no appeal perfected therefrom within the statutory time, and it is the duty of the sheriff to release the attachment of record.

**ID.—SETTING ASIDE OF ORDER OF NONSUIT—ATTACHMENT LIEN NOT REVIVED.**—An order setting aside an order granting a nonsuit cannot, in the absence of statutory provision therefor, revive the lien of an attachment which had been dissolved by the order of nonsuit.

**APPLICATION** for a Writ of Mandate originally made to the District Court of Appeal for the Second Appellate District to compel a sheriff to release a writ of attachment.

The facts are stated in the opinion of the court.

Perry F. Backus, and Herbert W. Kidd, for Petitioners.

Arthur C. Vaughan, J. M. Love, and Charles R. McCarty,  
for Respondents.

SHAW, J.—This is an original proceeding wherein an alternative writ of mandate was issued out of this court, directed to James C. Byers, as sheriff of San Diego County, requiring him to release of record a writ of attachment levied upon certain real estate in said county, or show cause why he should not do so.

It appears that in a certain action wherein Marvin Lathrop was plaintiff and petitioners, Frank C. and Jennie L. Woodford, were defendants, a writ of attachment was issued and by the sheriff of San Diego County levied upon the real estate in question; that thereafter in a trial of said action, had on December 7, 1917, defendants, under subdivision 5 of section 581 of the Code of Civil Procedure, moved the court for a nonsuit, in response to which motion the court made the following order: "Cause called, J. M. Love, Esq., appearing as attorney for the plaintiff and Perry F. Backus, Esq., appearing as attorney for defendants. Cause argued by counsel; motion of attorney for defendants for a nonsuit granted." This order was entered upon the minutes of the court and on the same day the clerk of the court made a note thereof in his register of actions, all as provided in section 581 *supra*. Whether these entries were made on December 7th, as claimed by petitioners, or on December 15th, as claimed by respondents, is immaterial, since, as shown, no appeal was at any time taken from the order.

The claim of petitioners is that the effect of the granting of the nonsuit was to dissolve the attachment, and in this contention we think they are correct. "An attachment is a creature of statute and its existence and operation in any case can continue no longer than the statute provides it may." (*Loveland v. Alvord Min. Co.*, 76 Cal. 562, [18 Pac. 682]; *Hamilton v. Bell*, 123 Cal. 93, [55 Pac. 758].) Section 553 of the Code of Civil Procedure provides that if defendant recovers judgment against the plaintiff and no appeal is perfected and undertaking executed as provided in section 946 of the Code of Civil Procedure, the order of attachment shall be discharged and the property released therefrom. As



stated, no appeal was at any time perfected from the order granting the nonsuit. That this order constituted a judgment in favor of defendants from which an appeal might have been prosecuted admits of no doubt. As declared by the statute, such orders, when entered in the minutes and by the clerk noted in his register of actions, are effective for all purposes. (*Brown v. Sterling Fixture Co.*, 175 Cal. 563, [166 Pac. 322]; *Hamilton v. Bell*, *supra*.) The effect of the entry of the order and notation thereof made by the clerk, in the absence of an appeal therefrom within five days as provided in sections 553 and 946 of the Code of Civil Procedure, was to *ipso facto* dissolve the attachment; and thereupon it was, as declared in subdivision 7 of section 4157 of the Political Code, the duty of the sheriff of San Diego County to release the same of record. It is true the court on December 29th made an order granting plaintiff's motion to set aside and annul the order of nonsuit. But such order could not, in the absence of statutory provision therefor, revive the lien of the attachment which had theretofore been dissolved by the judgment in favor of defendants, and which, in so far as concerned the attachment, had become final.

It is ordered that the alternative writ of mandate heretofore issued to James C. Byers, as sheriff of San Diego County, be and the same is made peremptory.

Conrey, P. J., and James, J., concurred.

A petition for a rehearing of this cause was denied by the district court of appeal on July 27, 1918, and a petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on September 3, 1918.

[Civ. No. 2418. First Appellate District.—July 5, 1918.]

J. L. RAVN, Appellant, v. THEODORE PLANZ, Respondent.

**DISMISSAL OF ACTION—FAILURE TO BRING TO TRIAL WITHIN FIVE YEARS —MANDATORY PROVISION.**—The provision of section 583 of the Code of Civil Procedure as to the dismissal of actions not brought to trial within five years after the filing of the answer is mandatory, and the circumstance that the trial was postponed several times without plaintiff's consent, one of those occasions being a relatively short time before the date when the defendant would be entitled to require the court to dismiss the action, is a matter of no significance.

**APPEAL** from an order of the Superior Court of the City and County of San Francisco dismissing an action. Geo. E. Crothers, Judge.

The facts are stated in the opinion of the court.

Brewster F. Ames, William A. Nunlist, and Frank J. Golden, for Appellant.

Dan Hadsell, and Hadsell, Sweet & Ingalls, for Respondent.

**KERRIGAN, J.**—This is an appeal from an order dismissing the action because not brought to trial within five years after the defendant filed his answer.

Section 583 of the Code of Civil Procedure provides that an action "shall be dismissed . . . on motion of the defendant, after due notice to plaintiff or by the court on its own motion, unless such action is brought to trial within five years after the defendant has filed his answer, except where the parties have stipulated in writing that the time may be extended." This action was not brought to trial within the designated time, and it is not claimed that the parties entered into a stipulation in writing extending the time within which it might be tried. To save this case from the operation of the statute the plaintiff shows that on several occasions the trial of the action was postponed upon the motion of defendant, and that upon a date within about six months prior to the expiration of the five years after the case was at issue, it being then upon the calendar for trial, he appeared in court

with his counsel and witnesses ready to proceed, but upon motion of the defendant, and over his objection, a further postponement of the trial was granted. Later the case was again called for trial, when a motion to dismiss was made by the defendant and granted.

The provision of section 583 above set forth is mandatory. (*Romero v. Snyder*, 167 Cal. 216, [138 Pac. 1002]; *Larkin v. Superior Court*, 171 Cal. 719, [Ann. Cas. 1917D, 670, 154 Pac. 841].) The circumstance, therefore, that the trial of the cause was postponed several times without plaintiff's consent, one of those occasions being a relatively short time before the date when the defendant would be entitled to require the court to dismiss the action, is a matter of no significance. Courts are, of course, loath to deny to a litigant a trial upon the merits; but the section of the Code of Civil Procedure above recited directs in plain terms that it shall be done when a case falls within the conditions stated; and the present is such a case. The trial court had no discretion. The motion being made, its duty was to dismiss. To relax the rule to cover hard cases would be to set at naught the express will of the legislature.

As to the suggestion of counsel for the plaintiff that to construe this statute as mandatory will result in extraordinary anomalies, it may be said that other statutes are subject to the same criticism; many of our statutes, whether relating to procedure or other matters, are not ideal, and often are but compromises, and sometimes work injustice. But in the present case it may be said that if the plaintiff, at the time of the last postponement of the trial, had called the court's attention to the consequence which would flow from it, he could readily have secured an earlier date for the trial, or possibly a stipulation from opposing counsel waiving the benefit of the statute. As to the hardships suggested by counsel in supposed cases, it is not necessary to consider them at this time. It is sufficient to decide the case presented.

In view of what has been said and of the rule laid down by the supreme court in the cases above referred to, it follows that the portion of the decision of this court in *Mazitelli v. Crane*, 35 Cal. App. 264, [169 Pac. 721], at variance with the conclusion here arrived at must be deemed overruled.

The order is affirmed.

Zook, J., *pro tem.*, and Beasley, J., *pro tem.*, concurred.

[Civ. No. 2182. Second Appellate District.—July 5, 1918.]

**D. I. MAGEE, Respondent, v. W. J. BURT MOTOR CAR COMPANY (a Corporation), Appellant.**

**CONDITIONAL SALE—DEFAULT OF VENDEE—RETAKEING OF POSSESSION AND RESALE BY VENDOR—NONLIABILITY FOR CONVERSION.**—A vendor of personal property which had been delivered to the vendee under a conditional sale contract, which authorized the vendor to demand and have possession of the property "at any time before said sale and transfer," cannot be held guilty of conversion in taking possession of the property under a claim and delivery action and thereafter making a resale thereof, where the vendee was in default and made no reasonably prompt tender of performance.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. C. A. Raker, Judge Presiding.

The facts are stated in the opinion of the court.

James W. Bell, for Appellant.

Gilbert & Levy, for Respondent.

**CONREY, P. J.**—The defendant appeals from the judgment. The record has been prepared under the alternative method. Counsel in their briefs have complied very slackingly with the provisions of section 953c of the Code of Civil Procedure. So far as shown by those portions of the record which are set out in the printed briefs, or stated by counsel on one side and definitely admitted by counsel on the opposing side, the facts of the case are as hereinafter stated. Matters not so presented will not be discussed.

Respondent brought this action to recover damages for the conversion of a certain automobile. On July 29, 1914, appellant delivered to the respondent the said automobile under a conditional sale agreement, pursuant to which respondent paid appellant \$150 and gave to appellant twenty-two promissory notes, the first of which matured one week after that day and the remaining ones at the rate of one each week thereafter until the thirtieth day of December, 1914. The notes represented weekly payments of one hundred dollars, except

the last payment, which was to be \$80. The first of said notes was as follows:

“\$100.00.

Los Angeles, Cal., July 29, 1914.

“One week after date, without grace, for value received, I promise to pay to the order of W. J. Burt Motor Car Company one hundred dollars, payable in gold coin of the United States of America, with interest thereon in like gold coin, from date until paid, at the rate of 7% per cent per annum. And in case a suit or action is instituted to collect the money above mentioned, or any portion thereof, I promise to pay ten per cent on the sum first aforesaid, additional to said amount, as attorney’s fees, in such suit or action. The above note is given upon and for the consideration that the said W. J. Burt Motor Car Co. have agreed and promised that upon the payment of said note and all other notes outstanding of even date herewith, principal and interest, at maturity (*time being the essence of this contract*), they will sell and transfer to the undersigned, at the price of said principal and interest, the one white, six cylinder, Auburn touring car, factory number 11539, fully equipped, which said W. J. Burt Motor Car Company have this day entrusted to the care of the undersigned. It is admitted and agreed that said property so entrusted is the property of said W. J. Burt Motor Car Co., and the legal title thereof is in the said W. J. Burt Motor Car Co., and shall remain in them until they shall make the aforesaid sale and transfer after the principal and interest aforesaid shall be paid.

“And the undersigned agrees to return and deliver the said automobile to the said W. J. Burt Motor Car Co., if requested at any time before said sale and transfer, in good order.

“Principal and interest payable in U. S. gold coin at First National Bank, Los Angeles, Cal.

“D. I. MAGEE.”

It was stipulated that the note above set forth constituted the entire and only contract between the parties to this action; which means, presumably, that all of the notes were alike in form.

Respondent paid twelve of these notes, the last of the twelve being paid February 11, 1915, at which time all of the notes were past due. Respondent paid one hundred dollars additional in three checks, of which one was dated February 2 and the others February 11, 1915, and by his own admission

he still owed \$880, with interest. On the eleventh day of May, 1915, appellant took possession of the automobile under a claim and delivery action in the superior court of Los Angeles County, and surrendered in court all the unpaid notes. At the time of retaking the automobile its value was about eight hundred dollars. Appellant paid out and expended in repairs on the automobile the sum of \$458, and on the twenty-seventh day of December, 1915, sold it for the sum of one thousand four hundred dollars. Respondent claimed, and by the judgment herein was awarded, the difference between the unpaid portion of this contract and the amount of the resale, which difference was found to be \$429.55.

Appellant contends that upon its taking possession of the automobile, all obligations under the contract between it and the respondent were thereby terminated. The rule relied upon was stated in *Pacific Carbonator Co. v. Haydes*, 26 Cal. App. 607, [147 Pac. 988], to the effect that "A vendor of property which has been delivered to his vendee under a conditional sale contract has the option in case of default either to recover payments provided to be made under the contract, or to retake the property and put at an end all further obligation on the part of either party." In that case, the vendor did not elect to retake the property, but prosecuted its action to recover the full contract price. It was held that the plaintiff was entitled to recover. The contract in that case differed from the one now before us in this, that the contract there expressly provided that, in the event of default as to any payment agreed to be made by the vendees, repossession of the machinery sold might be had by the vendor, and in that event all payments theretofore made should be deemed to have been payments made for the use of the machinery. In the present case the contract authorizes the vendor to demand and have possession of the property "at any time before said sale and transfer" (independently of any default of the vendee), and provides further that time is of the essence of the contract. "It has been held in this state that where the vendor, in case of a conditional sale, retakes possession pursuant to the terms of the contract, the defaulting vendee may still complete the purchase and perfect his right to receive the property by paying the balance due. (*Miller v. Steen*, 30 Cal. 407, [89 Am. Dec. 124].) This upon the theory that a mere delay in the payment of money is

ordinarily 'capable of exact and entire compensation,' and will not, *unless time has expressly been made of the essence of the obligation*, bar the right of the party in default to tender payment, with interest, at a later date, and demand performance of whatever obligation was due him upon such payment." (*Liver v. Mills*, 155 Cal. 459, 462, [101 Pac. 299].) But even so, in the absence of any reasonably prompt tender of performance by the delinquent purchaser, the vendor cannot be held guilty of conversion when he sells the property to a third person. Nor is the vendor's right to resell the property lost by accepting partial payments from the conditional vendee after the entire contract price became due. In the case at bar the respondent did not pay or offer to pay anything on account of his contract at any time after February, 1915. Appellant obtained possession of the automobile in May, 1915, but did not sell it until the following December. Under the same conditions, and under a very similar contract, it was held that the vendor, in making a resale, acted within his rights. (*Benedict v. Greer-Robbins Co.*, 26 Cal. App. 468, [147 Pac. 486].) So here the plaintiff being in default, and the defendant being the owner of the automobile, and lawfully in possession thereof, the defendant cannot, by reason of making such sale, be held guilty of an unlawful conversion thereof to its own use.

The judgment is reversed.

James, J., and Works, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on September 3, 1918.

[Civ. No. 2435. First Appellate District.—July 6, 1918.]

MINNIE E. DONNELLY, Respondent, v. EDWIN C. WETZEL et al., Appellants.

**PARTITION—PERSONAL MONEY JUDGMENT—JURISDICTION.**—In an action in partition, where the complaint alleged that one of the defendants had acquired an undivided two-thirds interest in the property from his codefendants with full knowledge that plaintiff had a claim against said codefendants for money advanced by plaintiff upon their part of the purchase price, such codefendants were proper, if not necessary, parties to the action, and their disclaimer filed in the action did not prevent the court from rendering a personal judgment against them in favor of plaintiff for the amount of such advancement.

**APPEAL** from a judgment of the Superior Court of Contra Costa County. A. B. McKenzie, Judge.

The facts are stated in the opinion of the court.

J. W. Henderson, and J. G. Reisner, for Appellants.

J. P. O'Brien, for Respondent.

BEASLY, J., *pro tem.*—This was primarily an action in partition. In addition to a judgment that the property involved be sold and the proceeds divided, as will hereinafter appear, the court also gave a personal judgment of six hundred dollars in favor of the plaintiff, Minnie E. Donnelly, and against the defendants, Edwin C. and Eva L. Wetzel, his wife, and from this money judgment against them the Wetzels appeal. The authority of the court to render this personal judgment in this action is the only question in the case.

The plaintiff and the Wetzels purchased the property from H. C. Petray for four thousand five hundred dollars, payable one thousand five hundred dollars in cash and the remaining three thousand dollars to be secured by a mortgage on the premises to Petray. The plaintiff paid one thousand one hundred dollars of the initial payment and the Wetzels paid only four hundred dollars thereof. It appears, therefore, that Miss Donnelly paid six hundred dollars of the pur



chase price which the Wetzels should have paid. Pursuant to this, the payment of the one thousand five hundred dollars and the execution of the mortgage to him of the three thousand dollars by the purchasers, Petray, the owner, on the twenty-seventh day of June, 1911, conveyed the property to the plaintiff and the Wetzels. On February 14, 1914, the Wetzels, without paying the plaintiff the six hundred dollars which she had advanced upon their part of the purchase price, conveyed an undivided two-thirds interest in the property to the defendant Honey. On February 21, 1914, Petray, the mortgagee, assigned the mortgage to the defendant Gazzola.

It was conceded at the trial and found by the court that the property could not be divided, and the court therefore adjudged that it be sold. It was decreed that the plaintiff and Honey were tenants in common of the property, a one-third undivided interest therein belonging to Miss Donnelly and the remaining two-thirds to Honey; that two thousand dollars and certain interest was still unpaid on the mortgage; and the court thereupon directed the application of the funds which should result from the sale of the property to the settlement of the mortgage, the costs, etc., and that the balance be divided between Miss Donnelly and Mr. Honey in the proportion of one-third to her and two-thirds to him, and, as hereinbefore stated, in addition to this judgment, the propriety of which is unquestioned, gave Miss Donnelly a personal judgment for six hundred dollars against the Wetzels. On this appeal the Wetzels claim that the court had no jurisdiction in this partition suit to decree a personal judgment in Miss Donnelly's favor against them, but should have left her to her action at law. In the complaint the plaintiff alleged on information and belief that Honey had acquired the property with full knowledge of her overpayment. The court, however, found that Honey acquired the property without notice or knowledge of this. The Wetzels answered, filing a disclaimer of any interest in the property, and contended that they were not proper parties at all to the partition suit, on the ground that they had parted with their interest before it was begun; but the allegation that Honey acquired the property with notice of Miss Donnelly's claim for the six hundred dollars against the Wetzels made the Wetzels proper, if not necessary, parties to this action. Their

disclaimer could not relieve them from the position in which they were placed as parties to this suit in equity who appeared therein; and once being parties to the action and personally before the court, the trial court, as a court of equity, had authority to adjust all of the claims arising out of the transaction which might exist between the parties. This it did.

The judgment is affirmed.

Kerrigan, J., and Zook, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on September 3, 1918.

---

[Civ. No. 2440. First Appellate District.—July 18, 1918.]

**CALIFORNIA VEGETABLE UNION** (a Corporation), Appellant, v. **CROCKER NATIONAL BANK OF SAN FRANCISCO** (a National Banking Association), Respondent.

**BANKING LAW — PAYMENT OF FORGED CHECKS — NEGLIGENCE OF DEPOSITOR.**—A bank is not liable to a depositor for money paid out on forged checks of the cashier of the depositor extending over the period of almost one year where at the end of each month the forged checks, together with the valid checks which had been paid during the month, were returned to the depositor with a statement of account, accompanied with a written request to report discrepancies within fifteen days, and neither the depositor nor its manager ever made any examination of the returned checks and statements until after the cashier had absconded.

**ID.—ACTION BY DEPOSITOR—STATUTE OF LIMITATIONS.**—The provision of the statute of limitations embodied in subdivision 3 of section 340 of the Code of Civil Procedure that an action against a bank by a depositor for the payment of a forged check must be brought within one year begins to run on presentment and payment of the check, and not upon discovery of forgery.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. Frank J. Murasky, Judge.

The facts are stated in the opinion of the court.

Walter R. Bacon, for Appellant.

Morrison, Dunne & Brobeck, and J. F. Shuman, for Respondent.

BEASLY, J., *pro tem.*—The California Vegetable Union is a Los Angeles concern having a branch house in San Francisco. Of this branch house during the period in which we are interested H. F. Ardery was the manager and Fred B. Weeks the cashier. During the years 1911 and 1912, and until the end of the year 1913, the plaintiff's branch house in San Francisco was a depositor of the defendant bank. The bank was instructed to pay checks of the plaintiff when signed by Fred B. Weeks, its cashier, and H. F. Ardery, its manager. Weeks became an employee of the plaintiff about the 1st of May, 1912, and continued in that employment until about September 1, 1913, when he "departed these quarters for parts unknown, leaving behind him a trail of forged checks." Between September 18, 1912, and August 28, 1913, Weeks forged the name of Ardery to 136 separate checks, all drawn upon the plaintiff's account in the defendant bank, and aggregating \$3,972.65. The bank cashed these checks and charged their amount to plaintiff's account. The checks went through the bank during the various months of this period, and at the end of each month the forged checks paid during that month, together with all the valid checks of the plaintiff, were returned to it, with a list of all checks paid by the bank during that month. The statement accompanying the vouchers also showed the balance to the credit of the plaintiff at the end of the preceding month in each instance, the amounts of all deposits made by it during that month, and separately all checks of plaintiff paid by the bank during the current month, and the balance to the credit of the plaintiff on the defendant's books at the end of the month. These returned checks and these accounts for all of the months from August, 1912, to August, 1913, although regularly received in the course of business at the end of each month during that period, were never examined by the plaintiff, nor by its manager, Ardery, until some time in September, 1913, after Weeks had absconded. During the period in which the forgeries were perpetrated Mr. O'Neal, the president of the plaintiff company, visited the San Fran-

cisco branch on several occasions. He had opportunity to examine the account of the plaintiff in the bank and the returned checks and vouchers, but he never did it. He did, however, see the general statement showing the bank balance of the branch house during that time. Other officials of the company visited the office in San Francisco during the period, but none of them ever examined or paid any attention whatever to the bank balances or to the written statements of the business of the branch with the bank. The plaintiff also employed an auditor in its Los Angeles office, whose duty it was to examine its bank balances and check up month by month the canceled checks and vouchers, but no examination of the checks and vouchers of the branch in San Francisco was ever made by this auditor during that time, nor by anyone performing similar duties.

Mr. O'Neal testified that he knew it to be a custom of banks to furnish to their depositors monthly statements showing their balances, together with the vouchers and canceled checks that had been paid and charged to the account during the month; that he never asked Mr. Ardery if he was having that done in San Francisco; that the checks were made up in blocks of one hundred each; that a check register was kept numbered to correspond with the various numbers of the checks, and ruled so that the purpose of the check is stated in the cash-book or check register; that the regular system of the plaintiff was that every time a check went out the company had a list or memorandum of the check in the office, and that it was possible when the checks came back from the bank at the end of each month to compare them with the check register by numbers and amounts, but this was never done. Had any of these precautions been taken, Weeks' rascality would have been discovered. Weeks was not without considerable skill in these forgeries. The forged signatures of Ardery were strikingly similar to his true signature. Several officers of the defendant bank, all skilled in the detection of forgeries, testified that this was so. Mr. Ebner, the assistant cashier of the bank, who has had thirty-three years' experience in examining signatures on bank checks, said that if the bank were to refuse payment of checks bearing signatures agreeing as closely with the authorized signature in the bank as did the forged signatures of

Ardery, the result would be a refusal of payment of about half the checks presented at banks.

Ardery excused his remissness in paying no attention to the bank account by the curt statement that it was none of his business; that "Weeks was under bond to take care of that end of the work." Generally speaking, the method of these parties in doing business may be said to have corresponded with the customs of metropolitan banks and their depositors in transacting business with each other; and it appears from the evidence that had Mr. O'Neal or Mr. Ardery or their auditor given any attention whatever to the returned checks or to the state of plaintiff's bank balances, they would have known that from the beginning of his transaction of business with the bank Weeks was forging the name of Ardery to checks, cashing them, and converting the money to his own use.

The court gave judgment for the plaintiff for \$40, this being based on two checks of \$20 each forged and uttered by Weeks prior to his disappearance on the last day of August, and paid by the bank in September about a week after it had been notified by Ardery of the other forgeries.

The principal problem in this case may be stated in the language of the supreme court in the case of *Otis Elevator Co. v. First Nat. Bank*, 163 Cal. 31, [41 L. R. A. (N. S.) 529, 124 Pac. 704], and is as follows: "The claim made by the appellant was that the evidence presented the simple case of a forgery to which is to be applied the well-settled rule that as between the bank and its customer the payment of forged or altered checks by such bank is made at its peril and cannot be charged to the depositor's account. This, of course, is the general rule, and it is applied stringently in cases of simple forgery which involve no other elements than that the purported check of the depositor which was paid was a forged one. But this rule is not applied unqualifiedly. It has its limitations and exceptions, as general rules usually have, and is modified to the extent that when some negligent act of the customer has contributed to the payment by the bank, or the facts in a particular case surrounding the forgery of a check and its presentation and payment are of such character as call for the application thereto of some general principle of law or equity, they may be relied upon by the

bank as an estoppel against the customer precluding him from denying the correctness of the payment."

The exact question here involved has never been squarely decided in the courts of this state so far as we have been able to discover. An instruction in accordance with the contention of the appellant was expressly disapproved in the case of *Janin v. London & San Francisco Bank*, 92 Cal. 14, [27 Am. St. Rep. 82, 14 L. R. A. 320, 27 Pac. 1100], which instruction read as follows: "In considering the fact that Mr. Janin's bank-book was balanced, and that the bank's statement of the balance was apparently acquiesced in for a considerable length of time, I instruct you that the plaintiff was under no contract with the bank to examine with diligence his returned checks and bank-book. In contemplation of law the book was balanced and the checks returned for the protection of the depositor, not for the protection of the bank, and when Mr. Janin failed to examine it, the only consequence was that the burden of proof shifted. Mr. Janin then became bound to show that the account was wrongly stated. This right he has preserved so long as the claim was not barred by the statute of limitations." "This instruction," says the court in the opinion, "although supported by the authority of *Weisser v. Dennison*, 10 N. Y. 68, [61 Am. Dec. 731], is not, in our opinion, entirely correct, and is in conflict with the other instruction referred to. When considered in connection with a portion of another instruction given, to the effect that it 'was sufficient to give notice when the forgery was discovered,' this instruction clearly implied that the plaintiff could not be charged with negligence in not examining his checks within a reasonable time, and that the jury were only to inquire whether he was guilty of unreasonable delay in giving notice after he made the examination and discovered the forgery. This is not the true rule. . . ." The court thus disapproved of the exact contention which counsel for appellant makes in this case, although it must be said that it did not reverse the case for that reason, but on other grounds, holding that in view of the undisputed evidence in the case the giving of this erroneous instruction did not justify a reversal of the judgment. This case and the case of *Otis Elevator Co. v. First Nat. Bank*, *supra*, are the only cases that we have been able to find in this jurisdiction, where this rule has been considered

by the court; and in neither of those cases, it must be admitted, were the facts exactly those of this case; nor did the supreme court in either of those cases finally base its decision upon the propositions of law here involved. However, those cases appeal to us as sound expressions of the legal principle which must apply to the facts of the case at bar; and our conclusion in that respect is in accord with the weight of authority in the United States.

The principle embodied in the case of *Otis Elevator Co. v. First Nat. Bank*, *supra*, and the general rule above stated, find emphatic approval and application in the leading case of *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 96, [29 L. Ed. 811, 6 Sup. Ct. Rep. 657], in which the court, treating the presentation of a bank-book written up accompanied by the canceled checks of the depositor to him as an account stated, says: "Where a party to a stated account, who is under a duty from the usages of business or otherwise, to examine it within a reasonable time after having an opportunity to do so, and give timely notice of his objections thereto, neglects altogether to make such examination himself or to have it made in good faith by another for him, by reason of which negligence the other party, relying upon the account as having been acquiesced in or approved, has failed to take steps for his protection which he could or would have taken had such notice been given, the depositor is estopped by his conduct to question the conclusiveness of the account stated which arises out of the presentation to him of the account and his failure to examine it and detect the frauds contained therein, and give the bank notice thereof in order that it may protect itself against future frauds of a similar character."

In addition to the rule laid down very clearly after an able and exhaustive discussion in the case of *Leather Manufacturers' Bank v. Morgan*, *supra*, the question has been before the court of appeal of the state of New York in the case of *Morgan v. United States Mortgage & Trust Co.*, 208 N. Y. 218, [Ann. Cas. 1914D, 741, L. R. A. 1915D, 741, 101 N. E. 871], in which the legal principle in issue here was approvingly applied and clearly stated in the following language (syllabus): "Primarily a bank may pay and charge to its depositor only such sums as are duly authorized by the latter, and of course a forged check is not authority for such pay-

ment. It is, however, permitted to a bank to escape liability for repayment of amounts paid out on forged checks by establishing that the depositor has been guilty of negligence which contributed to such payments and that it had been free from negligence. A depositor who sends his pass-book to be written up and receives it back with his paid checks as vouchers is bound under certain circumstances to examine the pass-book and vouchers, and report to the bank without unreasonable delay any errors which may be discovered." The facts in that case were very similar to those in the case at bar, and are stated in the opinion substantially as follows: "The trustees of an estate had a deposit account with a bank, and checks drawn thereon were signed by a rubber stamp imprinting the name of the estate, authenticated by the actual signature of either trustee. The trustees had a clerk, who was their agent in dealing with the bank. He made deposits, filled out the body of the checks, and obtained from the bank the pass-book and vouchers and accompanying check list whenever the account was balanced. During a period of about a year he forged a number of checks aggregating a large sum, and employed in his forgeries the rubber stamp, with the simulated signature of one of the trustees in authentication thereof. Whenever the account was balanced the clerk withdrew from the vouchers and destroyed the checks forged by him and also the check list, and after as long a delay as convenient delivered the pass-book and the genuine vouchers to the trustees, who knew that the pass-book was balanced frequently and returned with the paid checks as vouchers and with a detailed list thereof. The trustees also had a journal and ledger account, upon the stubs of which were entered the genuine checks presented to and paid by the bank. The trustee who examined the pass-book and vouchers never asked for the check list, which he knew was returned with the vouchers and which would have shown the payment of the forged checks. He did not examine the balances shown by the pass-book which were struck after the payment of the forged checks, but contented himself with a comparison of the genuine checks with the check-book and with the books of the estate, which comparison disclosed no sign of the forgeries. The bank also paid interest on the account, and an examination of the pass-book would have shown that the amount of interest credited thereon was much



less than that on the books of the estate and less than would have appeared except for the payment of the forged checks." On this state of facts in that case the court of appeals of New York held that the depositors, by their own negligence in failing properly to examine their pass-book and vouchers, contributed to the payment of the forged checks, and hence that the plaintiff could not recover from the bank the amounts so paid. That case settled the question in New York, overruling the earlier case of *Weisser v. Dennison*, 10 N. Y. 68, [61 Am. Dec. 731], relied on by appellant. It seemed necessary to so settle the question, as the authorities were in some confusion in that state upon this subject previous to the adjudication of *Morgan v. United States Mortgage & Trust Co.*, *supra*.

In Pennsylvania the leading case of *Myers v. Southwestern Nat. Bank*, 193 Pa. St. 1, [74 Am. St. Rep. 672, 44 Atl. 280], held in conformity to the views of the United States supreme court and of the court of appeals of the state of New York in the case above cited and other cases, upholding the same doctrine, and stated that if the plaintiff's duty to the bank had been performed at the proper time, the fact would have appeared that the bank had charged the plaintiff on his bank-book with the payment of two items for which no vouchers appeared among the checks handed to him by the clerk, and that no objection having been made at the time of the presentation of the statements by the bank, the latter had the right to assume that everything was correct, including the two checks purporting to have been forged, and that the silence of the plaintiff was tantamount to a declaration to that effect, and that in afterward honoring checks signed by the same person the bank had a right to consider the fact that these signatures had been at least tacitly recognized by the plaintiff as genuine. Further, the court in that case said: "In view of the uncontradicted evidence as to the foregoing facts, it cannot be doubted that as between the bank and the plaintiff the latter alone should be held responsible for the consequences resulting from the failure to examine the checks in question and approve or reject them within a reasonable time. In contemplation of law the delivery of the checks to plaintiff's clerk was a delivery by the bank to the plaintiff himself, as the basis on which its credits were claimed. The bank was, therefore, entitled to have them examined, and, if

rejected, returned within a reasonable time. That was not done, and because of plaintiff's failure to perform his duty in that regard he should not be permitted to recover. Any other rule would be inconsistent not only with general and long-established custom, but also with well-settled principles of law on the subject."

Without quoting further it may be said that the great weight of authority in the United States supports the conclusions arrived at in the cases above cited. It is true that those cases were based upon bank-books written up, but there is no distinction in principle between the old-fashioned bank-book and the modern statements furnished by a bank to its depositors from time to time upon the balancing of their accounts and the return of the canceled checks to them. Improved methods of bookkeeping in banks do not render inapplicable the rule of law here invoked and applied. To lay down any other rule than that hereinabove stated would be to add an unjust burden to the duties of paying officers of banks. The greatly increased volume of business consequent upon the development of modern commerce, and the almost universal use of checks in settlement of every conceivable obligation, make the post of paying teller of a bank—compelled as he is to know the signature of every depositor of a bank—an exceedingly difficult one. If depositors may regularly at frequent intervals receive their vouchers and be notified, as was the appellant here, of reduced balances of their accounts in banks consequent upon the unfaithfulness of trusted employees during a period of nearly a year, and by neglecting to exercise reasonable supervision over their own business fail to discover fraud which has been perpetrated upon them and the bank, and may thus leave the bank in ignorance of the frauds thus committed, and charge the bank with the losses thus occasioned, then banks and their paying tellers face hard conditions indeed. We do not feel justified in establishing any such rule in this state.

In the case at bar there is an additional reason for the application of this principle arising from the fact that the statements and returned checks were accompanied by the following written request on the part of the bank: "Please examine the inclosed account and return this at your earliest convenience signed by the principal, as this bank will not consider itself responsible for errors or discrepancies which

are not advised within fifteen days after delivery of the statement." The repeated failures of the appellant to heed this request speaks with much force in favor of the application of the principles above stated.

The claim that the plaintiff never received these statements is hardly worthy of notice, as its officers visited its branch house in San Francisco from time to time, as we have seen, and its manager, Mr. Ardery, was in charge of the branch house constantly during the time when these forgeries were being perpetrated. Their possession of and control over these statements and returned checks follow from their control of their branch establishment.

The final contention of counsel for the appellant is that the trial judge should, even in his view of the law, have given judgment for \$140 in addition to the \$40 in favor of the appellant to cover three checks in that amount forged by Weeks and paid by the bank in September, 1912, they being the first forgeries, and having been paid by the bank in September, 1912, and included in the bank's statement of October 1st following.

One of the defenses set up by the respondent was that provision of the statute of limitations embodied in subdivision 3 of section 340 of the Code of Civil Procedure, in which it is provided that an action against a bank by a depositor for the payment of a forged check must be brought within one year. This section was added to the statute by amendment in the year 1905. The three checks making up the \$140 for which appellant claims an additional judgment should have been given him were paid more than one year before the beginning of this action, the action having been commenced on the 18th of May, 1914. They were also included in the statement rendered by the bank to the plaintiff more than one year before the beginning of the action. It is contended by the plaintiff that its cause of action against the bank upon these three checks did not ripen until discovery by it of the forgeries of Weeks, the argument being based, of course, upon the proposition that an action counting upon fraud does not ripen until the discovery of the fraud.

There are three answers to this contention which seem to us conclusive. The first is that the action of plaintiff was not based upon the fraud, but rather upon the contractual relations of the parties. It is impossible to read into the

plaintiff's complaint anything else than a simple action upon the contract between them. The forgeries of Weeks are not therein mentioned. The second answer to plaintiff's contention is this: The bank committed no fraud against the plaintiff. It concealed nothing from the plaintiff. The section of the code providing that the time for beginning an action upon fraud is postponed until the discovery thereof does not apply between parties to this action, because the bank was not in any sense a party to the fraud. The third answer to this contention is found in the case of *Masonic Benefit Assn. v. First State Bank*, 99 Miss. 610, [55 South. 408], in which the supreme court of the state of Mississippi, passing upon the question of the applicability of a statute providing that where the cause of action has been fraudulently concealed by the person against whom it lies the time for its commencement does not begin to run until the discovery of the cause of action, in a case where a depositor was suing a bank for cashing a check upon an unauthorized indorsement, said: "There was no fraud perpetrated or concealed on the part of the appellee. It paid the check in good faith, believing the indorsement genuine. Neither the appellant or the appellee was at fault in failing to discover the forged indorsement after the payment of the check. Appellee's failure to discover the forgery at the time it was presented, resulting in its payment, made it liable to the party defrauded to the amount of the check; but after that the duty rested equally on the appellant and appellee to discover the forgery, and appellant's opportunities for making the discovery were as good as appellee's, because appellant had in its possession the canceled check with the forged indorsement, which had been rendered to it as voucher. The running of the statute was, therefore, not delayed to the time of the discovery by appellant of the forged indorsement."

We therefore hold that the action on these checks aggregating \$140 was barred at the time the complaint herein was filed. For the foregoing reasons the judgment is affirmed.

Kerrigan, J., and Zook, J., *pro tem.*, concurred.

[Civ. No. 2437. First Appellate District.—July 9, 1918.]

V. FASSIO, etc., Respondent, v. JOHN B. WOOLFREY et al., Defendants; ESTHER NATHAN, Appellant.

**PLEADING—PARTIES—ACTION AGAINST WIFE.**—Under the provisions of section 370 of the Code of Civil Procedure, it is not sufficient to merely name the husband as a party defendant in an action against his wife, but he must also be served with summons.

**ID.—APPEAL—RIGHT TO SUE WIFE ALONE—PRESUMPTION NOT ENTERTAINABLE.**—Upon an appeal from a judgment upon the judgment-roll in an action against a wife, it cannot be presumed that the case falls within one of the exceptions enumerated in subdivisions 2 and 3 of section 370 of the Code of Civil Procedure, in which a wife may be sued alone, where the complaint alleges that the husband is joined because he is the husband of his codefendant.

**APPEAL** from a judgment of the Superior Court of the City and County of San Francisco. E. P. Shortall, Judge.

The facts are stated in the opinion of the court.

George A. Connolly, for Appellant.

I. M. Peckham, and Edwin H. Williams, for Respondent.

**KERRIGAN, J.**—This is an appeal from the judgment taken upon the judgment-roll alone.

The appellant, Esther Nathan, is one of the defendants in the action. Her husband is also joined as a defendant under the name of John Doe Nathan, "for the reason," as stated in the complaint, "that he is the husband of Esther Nathan." A judgment by default was entered against her. Her husband was never served with summons.

It is clear that under the provisions of section 370 of the Code of Civil Procedure it is not sufficient to merely name the husband as a party defendant in an action against his wife, but he must also be served with summons. It was so held in the case of *McDonald v. Porsh*, 136 Cal. 301, [68 Pac. 817]. There, as here, the status or relation of the defendants as husband and wife was set forth in the complaint, and upon the appeal, it appearing that the husband had not been served with summons, the court said: "Under the express provision

of the statute the husband is a necessary party defendant in all cases where the wife is sued; and this implies that he must not only be named in the complaint, but served."

The respondent does not seriously dispute that this is the settled rule. He argues, however, that as every reasonable presumption is to be indulged in favor of a judgment, it must be presumed on this appeal that the case falls within one of the exceptions enumerated in subdivisions 2 and 3 of section 370 of the Code of Civil Procedure, in which a wife may be sued alone. But here the complaint itself alleging, as it does, that the husband is joined because he is the husband of appellant, negatives the idea that the case falls within either of those exceptions to the rule requiring the husband to be joined; hence the presumption mentioned cannot be entertained.

The judgment is reversed.

Zook, J., *pro tem.*, and Beasley, J., *pro tem.*, concurred.

---

[Civ. No. 2420. First Appellate District.—July 10, 1918.]

W. R. GORDON, Respondent, v. RANSOME-CRUMMEY COMPANY (a Corporation), Appellant.

**STREET LAW—REGULARITY OF PROCEEDINGS—ISSUANCE OF BONDS—CONCLUSIVE EVIDENCE.**—In street improvement proceedings, where there is an evident attempt in good faith to comply with the statute, and such substantial compliance therewith that no one has suffered from lack of strict compliance, the issuance of bonds is conclusive evidence of the regularity of the jurisdictional proceedings.

**ID.—POSTING OF NOTICES—ISSUANCE OF BONDS—CURE OF TRIFLING DEFECT.**—In view of section 66 of the Improvement Act of 1911 (Stats. 1911, p. 730), a defect in the posting of two notices of the passage of the resolution of intention, in that they were posted 309 feet 4 inches apart instead of three hundred feet, as required by section 5 of the act, is cured by the issuance of bonds.

**ID.—NOTICES OF IMPROVEMENT—POSTING—SUFFICIENCY OF AFFIDAVIT.**—An affidavit as to completion of posting of the notice of improvement stating that the affiant had actually posted the notice on the street to be improved to a certain line, which line did not, however, mark the termination of the improvement, is sufficient where it was

also stated in the affidavit that affiant "posted said notices conspicuously along the line of said contemplated work or improvement at not more than three hundred feet in distance apart and not less than three in all, and when the work was to be done upon an entire crossing or any part thereof, in front of each quarter block liable to be assessed."

**ID.—COMPLETION OF POSTING OF NOTICES—SUFFICIENCY OF AFFIDAVIT.—**

An affidavit stating "that affiant posted said notices as herein specified on the 25th day of May, A. D. 1911," is a sufficient statement that the posting was "completed" on such date, as required by section 5 of the act.

**ID.—LIBERAL CONSTRUCTION OF ACT OF 1911.—**The Improvement Act of 1911 by its own provisions is to be liberally construed to the end that its purposes may be effected (Stats. 1911, p. 768, sec. 82), and the provisions regarding the posting of notices and the like are to be read in the light of the purposes to be accomplished.

**APPEAL** from a judgment of the Superior Court of Alameda County. T. W. Harris, Judge.

The facts are stated in the opinion of the court.

R. M. F. Soto, for Appellant.

Frank J. Gordon, and Willes Whitmore, for Respondent.

**BEASLY, J., pro tem.**—The questions in this case arise out of the sale of certain property of the plaintiff to pay certain street assessment bonds which were issued by the city of Oakland in a proceeding taken by it under the Improvement Act of 1911. (Stats. 1911, p. 730.) The plaintiff brought an action to quiet title against the defendant, and the defendant answered, admitting that it asserted an interest in the real estate described in the complaint, and filed a cross-complaint, in which it set up all the proceedings leading up to the issuance of the bonds mentioned. Without going further into the pleadings in this case it may be said that the correctness of the lower court's judgment quieting the plaintiff's title to the land depends upon the validity of the street improvement proceedings.

The first point made by plaintiff against these proceedings is that the notice of the passage of the resolution of intention, required by section 5 of the Street Improvement Act of 1911 to be posted at intervals of not more than three hundred

feet in distance apart along the line of the contemplated improvement, was not so posted, in this, that two of these notices had an interval of 309 feet 4 inches instead of three hundred feet between them.

Section 66 of the Improvement Act of 1911 provides that bonds issued under the act shall by their issuance be conclusive evidence of the regularity of all proceedings leading thereto under the act. It is contended by the attorney for the defendant that the defect in the posting of the notices above referred to is cured by the issuance of the bonds in pursuance of section 66 of the act just quoted. On the other hand, the respondent contends that the defect is jurisdictional, and that a strict compliance with the statute as to posting was necessary to give the council authority to take further steps in the proceeding, and that, being jurisdictional, the defect could not be cured by the issuance of the bonds, or affected in any way by the so-called "conclusive evidence" provisions of section 66 of the act.

The whole question of the construction to be placed on such curative provisions as section 66 was discussed and, the profession of the law hoped, finally settled, so that no question thereon could ever thereafter be made, by the decision in the case of *Chase v. Trout*, 146 Cal. 350, [80 Pac. 81]; but it seems that the carelessness of city officials and the ingenuity of counsel will, in spite of the very clear and definite language of that case, still raise plausible objections to the jurisdictional steps taken by city councils in street improvement proceedings; and such has happened in this case. The supreme court, in *Chase v. Trout*, said that "the resolution of intention is the first step in the proceeding. It has to be published, and it is by means of such publication and the notice thereafter given which refers to it for particulars that the council acquires jurisdiction. It is a part of the 'due process of law,' required by the constitution, and want of which cannot be cured or waived by the legislature." To this statement of the law—which must be held to apply to the posting of this notice as well as the publication of the resolution of intention—Mr. Justice Shaw, in the opinion of the court, added this significant sentence: "There must be a substantial compliance with the provisions of the act in regard to this preliminary process."



From that case and the case of *Ramish v. Hartwell*, 126 Cal. 443, [58 Pac. 920], we understand that where, as here, there is an evident attempt in good faith to comply with the statute, and such substantial compliance therewith that no one has suffered from lack of strict compliance, the issuance of the bonds is conclusive evidence of the regularity of the jurisdictional proceedings. In other words, it cures such a trifling and inconsequential defect in the posting as here appears. This is within the spirit, and, indeed, the letter, of the rule in *Chase v. Trout*. We will not attempt to formulate a general rule as to what will constitute substantial compliance with the statute upon this matter; but in this case it would be trifling with justice to say that this proceeding, covering as it did a lengthy street improvement, and upon the validity of which thousands of dollars' worth of street improvement bonds may perchance depend, should be set aside because one of the notices was posted nine feet four inches farther away from the next one than it should have been.

The next attack on the proceeding is based on the insufficiency of the affidavit of the completion of posting of the notice of improvement. The law provides that "upon the completion of the posting of the notice of the improvement the superintendent of streets shall forthwith cause to be filed in the office of the city clerk an affidavit stating the fact of the completion of the posting of such notice and the date of such completion, and thereafter all persons shall be deemed to have notice of the date of the completion of the posting." The affidavit filed in the present case stated that the affiant had actually posted the notice of improvement mentioned in the resolution of intention on Congress Avenue (the street to be improved) "from the southeastern line of High Street to a line parallel to and distant 70 feet northwesterly from the southeastern line of Cortland Avenue, all as described in and in compliance with resolution of intention No. 38,146." The work on Congress Avenue was to be done not only to the line thus described 70 feet from Cortland Avenue, but also upon other parts of Congress Avenue; so that if the foregoing statement in the affidavit were all that it contained, there would be no showing that the notices were posted along the entire line of the contemplated work; but following the above-quoted portion of the affidavit was

the statement that affiant "posted said notices conspicuously along the line of said contemplated work or improvement at not more than three hundred feet in distance apart and not less than three in all, and when the work was to be done upon an entire crossing or any part thereof, in front of each quarter block liable to be assessed." This latter quoted statement is in the exact language of the statute providing for the posting of the notice. The statements are not inconsistent with the posting on that part of Congress Avenue southeasterly from the line of Cortland Avenue; both statements may be true; and it seems to us that that part of the affidavit which describes the posting of the notices as having been done to the line seventy feet northwesterly of Cortland Avenue must be read in the light of the further statement in the affidavit which, if it stood alone, would be sufficient to show the posting of the notices along the line of the contemplated work as provided in section 5 of the act. This is particularly true in view of the fact that it was the duty of the council, before proceeding further with this work, to find the fact of the posting of these notices, and that it found this fact apparently from this affidavit, thus putting a construction thereon. It seems to us that this finding of the council is by parity of reasoning within the principle laid down in *Tilton v. Russek*, 171 Cal. 731, [154 Pac. 860], in regard to an affidavit of diligence, in which the supreme court held that the sufficiency of such an affidavit being a subject for the determination of the court in which the validity of the proceedings was in issue, the court's conclusion would not be overturned where it had ruled upon the affidavit and held it to be sufficient.

A further criticism is made of this affidavit. The statute provides that this affidavit must state the fact of the completion of the posting of the notices, and the date of such completion, and that thereafter all persons shall be deemed to have notice of the date of the completion of such posting. The statement in the affidavit bearing upon this subject is "that affiant posted said notices as herein specified on the twenty-fifth day of May, A. D. 1911." It will be noted that the affidavit does not state categorically and in the language of the statute that the twenty-fifth day of May, 1911, was the date of the completion of the posting, nor does it use the word "completed" in relation to the posting of the

notices at all. Counsel for the respondent contends with much earnestness that the property owners having the right to protest at any time within fifteen days after the date of the completion of the posting of these notices against the proposed work, could ascertain the time within which they were to protest in only one way, namely, by an examination of this affidavit; and claims that the information required to enable them to know the time within which they could protest, namely, the date of the completion of the posting, is not contained in the affidavit, so that the time for protest has not yet run, or in any event, that the council acquired no jurisdiction to proceed further with the work.

Construction of documents such as this affidavit must be reasonable and sensible; and it seems to us that no persons reading this affidavit, in which it is stated that these notices were posted on the twenty-fifth day of May, 1911, could come to any other conclusion or construe the affidavit as meaning anything else than that the work of posting these notices was completed on that day. The language of the affidavit is equivalent to a statement that the notices were all posted on the twenty-fifth day of May, 1911, which could only mean that the posting was completed on that day. It seems to us that the fact of completion appears sufficiently from this. If, then, it be so conceded, it seems to us that the defect, if defect it is, falls within the rule of *Chase v. Trout, supra*, that a substantial compliance with the statute confers jurisdiction upon the council.

It may be said in passing that this proceeding involving the improvement of a long street, an expensive public work, which has been completed, should not be overturned on account of these defects in the proceeding. The Improvement Act of 1911 by its own provisions is to be liberally construed to the end that its purposes may be effected (Stats. 1911, p. 768, sec. 82); and as with the Vrooman Act, so with this act, "the provisions regarding the posting of notices and the like are to be read in the light of the purposes to be accomplished." (*Haugawout v. Percival*, 161 Cal. 491, [Ann. Cas. 1913D, 115, 119 Pac. 649].) No person can doubt that any property owner who may have read the affidavit of posting knew therefrom that his time for protesting began to run at the time stated in that affidavit, namely, on the twenty-fifth day of May, 1911; nor can we be

persuaded that any property owner was injured by the extra distance of nine feet four inches between two of the notices that were posted along the line of this work.

The judgment is reversed.

Kerrigan, J., and Zook, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on September 5, 1918.

---

[Civ. No. 2441. First Appellate District.—July 11, 1918.]

WILLIAM A. TULLOH, Appellant, v. E. J. BOYCE et al., Defendants; BERNICE ALSTON et al., Interveners and Respondents.

**MECHANICS' LIENS—CONTINUANCE OF LIEN PENDENTE LITE—LIS PENDENS.**—Where an action for the foreclosure of a mechanic's lien is commenced within the ninety-day period provided by section 1190 of the Code of Civil Procedure, the lien continues during the pendency of the action, and it is not essential to file a notice of *lis pendens* in order to preserve the lien as against purchasers pending suit.

APPEAL from a judgment of the Superior Court of Alameda County, and from an order denying a motion to vacate and enter a different judgment. Wm. S. Wells, Judge.

The facts are stated in the opinion of the court.

Frank W. Sawyer, for Appellant.

W. B. Rinehart, for Respondents.

**KERRIGAN, J.**—This is an action to foreclose a mechanic's lien. The appeal is from the judgment in favor of the interveners and against the plaintiff, and from an order denying plaintiff's motion to vacate the judgment and con-

clusions of law, and to enter a different judgment and conclusions of law upon the same findings.

The plaintiff was the contractor and lien claimant. The defendants were the owners of the property when the work was done, the lien filed, and the action commenced. The interveners were the purchasers of the property *pendente lite*. The claim of lien was filed, as provided in section 1187 of the Code of Civil Procedure, in due time in the recorder's office, the action to foreclose the same being commenced within ninety days thereafter, and the sole question presented on the appeal is, Does a party who in due time records a sufficient and valid mechanic's lien, have to record a notice of *lis pendens* upon the foreclosure of that lien in order to charge and hold the property against purchasers *pendente lite*?

Section 1190 of the Code of Civil Procedure, specifying the time of continuance of a mechanic's lien, in part then read: "No lien provided for in this chapter binds any building, mining claim, improvement, or structure for a longer period than ninety days after the same has been filed, unless proceedings be commenced in a proper court within that time to enforce the same." By implication this provision plainly means that when proceedings to foreclose the lien are commenced within the time designated, the lien continues, rendering it unnecessary to file a notice of the pendency of the action.

The authorities sustain this view. In the case of *Empire Land & Canal Co. v. Engley*, 18 Colo. 388, [33 Pac. 153, 155]—where the statute providing for the filing of a mechanic's lien and its foreclosure is similar to ours (reading that the lien should not hold the property longer than six months after filing the claim unless an action to enforce the same be commenced within time)—it was held that a purchaser or encumbrancer of property upon which a mechanic's lien has been filed is charged with notice thereof by virtue of the mechanic's lien statute itself, without the filing of a notice of *lis pendens*. Upon this point the Colorado court said: "Considering the design of these statutes we are of the opinion that it is not necessary to file a notice of *lis pendens* in an action to foreclose a mechanic's lien. The mechanic's lien statute prescribes the kind of notice to be filed by the claimants of such liens, and no additional notice

is necessary. . . . It is true that the statute provides the lien shall not hold the property for a longer period than six months, unless an action shall within that time be commenced to enforce the same. But this is equivalent to an affirmative declaration that the lien shall hold the property for a longer period than six months when an action is commenced within that time to enforce the same."

In Boisot on Mechanic's Lien, section 593, page 620, the author states: "It is not necessary, in the absence of express statutory direction, to file a notice of *lis pendens* in order to preserve the lien as against purchasers pending suit." And in Bloom on Law of Mechanics' Liens, page 601, section 658, we read: "Contrary to the general rule it has been held that a purchaser or encumbrancer of property upon which a claim of mechanic's lien is filed and suit is brought to foreclose the same, is chargeable with notice by virtue of the mechanic's lien without the necessity of filing a *lis pendens*."

It results from the foregoing that the trial court was in error in entering judgment in favor of the interveners and in denying plaintiff's motion above described. The judgment and order are, therefore, reversed.

Zook, J., *pro tem.*, and Beasley, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on September 6, 1918, and the following opinion then rendered thereon:

THE COURT.—In denying a hearing in this court we deem it proper to say that we are in entire accord with the opinion of that court in so far as it holds that filing of a notice of *lis pendens* is not essential to a continuance of the lien. By reason of the commencement of the action to enforce the lien within the ninety days, the lien continues during the pendency of the action, in view of the provisions of section 1190 of the Code of Civil Procedure. Further than this, it is not essential to go on this appeal.

The application for a hearing in this court is denied.

[Civ. No. 2271. Second Appellate District.—July 11, 1918.]

NATHAN COHN, Respondent, v. CARLIN G. SMITH et al.,  
Appellants.

**HUSBAND AND WIFE—PROPERTY ACQUIRED IN WIFE'S NAME—PRESUMPTION—EVIDENCE.**—The presumption that property acquired in the name of the wife is her separate property is not conclusive, and where the question of ownership is involved, the court is entitled to receive and consider any competent evidence which tends to disclose the manner of acquisition of the property, and from the acts and conduct of the husband determine whether the transaction whereby the property was conveyed to her constituted a gift.

**ID.—ACTION ON BUILDING BOND—HUSBAND'S OWNERSHIP—ESTOPPEL.**—In an action on a building contractor's bond, where it is shown that the contract for the erection of the building was entered into with the husband as owner, although the record title was in the name of the wife, and he as owner expended his money for the building, the obligors named in the bond are estopped from denying the husband's ownership, since as to them he should conclusively be presumed to be the real party in interest.

**ID.—DEFENSE OF LIEN CLAIMS—ATTORNEY'S FEES—RECOVERY ON BOND.** Where a building contract has been abandoned and the building completed by the owner as permitted by the contract, the owner in an action on the bond may recover money paid for attorney's fees in defending actions to recover upon lien claims.

**ID.—ACTUAL PAYMENT OF ATTORNEYS' FEES—RIGHT TO RECOVERY NOT AFFECTED BY.**—The fact that a part of the attorney's fees for which compensation had been allowed in the judgment had not been actually paid does not affect the owner's right to recover therefor.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Leslie R. Hewitt, Judge.

The facts are stated in the opinion of the court.

J. Wiseman Macdonald, for Appellants.

Kenton A. Miller, for Respondent.

**CONREY, P. J.**—The plaintiff, as owner of two lots in the city of Los Angeles, entered into a contract with the defendant Carlin G. Smith, as contractor, for the construction of a building on said lots. At the same time the contractor as

principal, and the other two defendants as sureties, executed a bond to the plaintiff as owner. The conditions of the bond were that the contractor "shall keep and strictly perform all the covenants and agreements of the contract by him to be kept and performed and shall on or before thirty-five days after the acceptance of said building on completion of said contract cancel and release the said building and premises from all claims of liens that may have accrued against the same in and from the performance of said contract, and shall save said owner free and harmless from all damage therefrom, all as in said contract provided." The judgment covers items allowed as damages for delay in completion of the building, and compensation on account of attorney's fees and costs incurred by the plaintiff in actions brought for the foreclosure of certain liens growing out of the performance of the contract. From that judgment the defendants appeal.

The defendants in their answers alleged that the plaintiff was not at the time said bond was given, nor was he at any time subsequent thereto up to and including the time of bringing this action, the owner of the land on which the buildings were constructed, or of the buildings erected thereon. The court found that these allegations were not true. Appellants contend that this finding is not supported by the evidence, and that the plaintiff is not the real party in interest, and therefore is not entitled to maintain this action. At the trial of the case it was stipulated that during all of said time the record title to the property described in the contract was, by virtue of a deed from a third person, in the name of Fannie Cohn, wife of the plaintiff. The plaintiff testified that when the lots were purchased he gave his personal check for the price paid, and that his wife did not pay anything for them, and did not pay anything to the plaintiff for them when the property was placed in her name; and that he did not intend to give the property to her. He further stated that he paid for everything connected with these two buildings and that she did not pay anything for their construction.

It is our opinion that the court's finding is sustained by the evidence. The lots having been acquired in the name of Fannie Cohn were presumptively her separate property, but this was not a conclusive presumption. The court was entitled to receive and consider any competent evidence which tended to disclose the manner of acquisition of the property,



and from the acts and conduct of the husband determine whether the transaction whereby the property was conveyed to the plaintiff's wife constituted a gift to her. (*Killian v. Killian*, 10 Cal. App. 312, [101 Pac. 806].)

We are further of the opinion that the defendants are estopped to deny plaintiff's ownership of said property. The plaintiff entered into the contract as owner, and as owner expended his money for the buildings. The giving of this bond was part of the inducement to him for entering into the contract. The obligors named in the bond should not now be heard to deny his title and thereby escape their liability. As to them he should conclusively be presumed to be the real party in interest.

The building contract contained the following paragraph: "Sixth: Should the contractor at any time during the progress of said works, refuse or neglect to supply a sufficiency of materials or workmen, the owner shall have the power to provide materials and workmen (after three days' notice in writing given) to finish the said works, and the reasonable expenses thereof shall be deducted from the amount of said contract price." The court found that the contractor at a stated time abandoned said buildings and thereafter refused to furnish material or labor therefor; and that the work was completed by the owner after due notice to the contractor in accordance with the contract. Appellants claim that the notice required by the contract was not given, and that without giving notice to the contractor the plaintiff wrongfully took possession of the premises and ejected the contractor therefrom; that thereby the sureties on the bond were released from their obligation. Edelman and Barnett were the architects named in the contract, under whose direction and supervision and subject to whose approval the work was to be done. Mr. Barnett testified that at the time the contractor ceased to work, Barnett, acting for the owner, served upon the contractor a written notice notifying him to finish the buildings. The so-called notice was produced in evidence by the plaintiff; not the paper served on the contractor, but the copy retained by the architects. This copy, which was signed by the contractor only, purports to be a stipulation between Edelman and Barnett, architects, and Smith, contractor, and sets forth certain items of work which must be done before the architects will accept the buildings. The stipulation then states that "if the

hereinabove mentioned items are not finished within three days, then the said architects shall have the privilege of completing the same, paying the necessary expenses thereof," etc. The copy retained by the contractor was not signed. About one week later, the contractor having failed to proceed with the work, the architects, under instructions from the owner, proceeded to complete the buildings. Upon these facts appellants base their contention as stated. We think that the stipulation was in substance a notice in writing within the terms of the contract. Although not signed by the owner, it was given by his authority and was accepted by the contractor as the equivalent of a signed notice and as being in fact a notice in writing. Under these circumstances the mere failure of the owner to sign the written notice does not operate to prevent it from being a notice in writing. The acts of the owner, in proceeding upon the theory that such notice had been given as required by the contract, did not constitute any substantial alteration of the obligations, rights, or remedies of the parties. Therefore we hold that there was nothing in the facts shown which operated to exonerate the sureties from the obligations of their bond.

It is next suggested by appellants that the plaintiff was not justified in paying attorney's fees in defending actions to recover upon lien claims filed against the premises on which these buildings were constructed, and that such expenditures do not fall within the terms of the bond. As found by the court, lien claims were filed by numerous laborers and materialmen, and actions were prosecuted to foreclose those liens. The contractor having failed to defend the actions, or to release, cancel, or discharge the liens, it became necessary for the plaintiff to employ counsel, and he did employ counsel, to defend said actions. The amount of money in the hands of the owner applicable to the contract price was less than the amount of these lien claims. In order to secure a determination of the amount that he must pay in order to release the liens, the owner had to prove how much he had reasonably expended for the completion of the buildings after the abandonment of the contract by the contractor, and he was entitled to have the rights of the lienors established by decree of court. "The contractors failing to perform their covenant, plaintiff's only course of safety was to secure a release of his property by proceedings in court. To accomplish this result it was

necessary to employ an attorney to represent him in such actions as were brought to enforce the liens." The reasonable amount paid to his attorneys for those services was a direct and proximate damage resulting from the contractor's breach of his contract, and of a covenant thereof for which the bond was security. (*Klokke v. Raphael*, 8 Cal. App. 1, [96 Pac. 392]; *Tally v. Ganahl*, 151 Cal. 418, [90 Pac. 1049]; *Bird v. American Surety Co. of New York*, 175 Cal. 625, [166 Pac. 1009].) If, as claimed by appellants, *Alcatraz etc. Assn. v. United States Fidelity etc. Co.*, 3 Cal. App. 338, [85 Pac. 156], and *Growall v. Pacific Surety Co.*, 21 Cal. App. 185, [131 Pac. 73], are in conflict with the supreme court decisions cited above, they must yield to the superior authority of those decisions.

The fact that a part of the attorney fees for which compensation has been allowed in the judgment has not been actually paid by the plaintiff does not affect his right to recover therefor. (*Henne v. Summers*, 23 Cal. App. 763, [139 Pac. 907].)

The judgment is affirmed.

James, J., and Works, J., *pro tem.*, concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on September 5, 1918.

---

[Civ. No. 2545. Second Appellate District.—July 11, 1918.]

OTILIE C. MUELLER, Respondent, v. NEAVAS  
MOUREN, as Administratrix, etc., Appellant.

**ACTION FOR SERVICES — REASONABLE VALUE — PAYMENT — INSUFFICIENCY OF FINDINGS.**—In an action to recover for services rendered, where by the pleadings the reasonable value of the services and the question of payment are made the chief issues, and no finding is made as to the reasonable value of the services other than that plaintiff worked "at the rate of thirty-five dollars a week," and no finding at all is made on the issue of payment, the judgment in plaintiff's favor is not supported by the findings.

APPEAL from a judgment of the Superior Court of Los Angeles County. Russ Avery, Judge.

The facts are stated in the opinion of the court.

A. G. Ritter, and Sarau & Thompson, for Appellant.

John Munro, and H. S. Laughlin, for Respondent.

SHAW, J.—Appeal by defendant from a judgment rendered in favor of plaintiff, who sought to recover for services alleged to have been rendered by her as a trained nurse for defendant's intestate at his special instance and request, the reasonable value of which services she alleged to be \$983.90, all of which it is alleged remained unpaid. The answer, among other things, denied that the reasonable value of the services alleged to have been performed by plaintiff was \$983.90 or of any value whatsoever, and denied that the same or any part thereof remained unpaid.

Upon the pleadings the reasonable value of the services rendered plaintiff was one of the chief issues which the court was called upon to determine. No finding, however, was made thereon, other than that she "worked . . . nursing . . . at the rate of \$35 a week"; hence we are left without information as to the "reasonable value" of her services. Neither is there any finding as to whether plaintiff had been fully paid, as alleged in the answer. Since, in our opinion, the findings do not support the judgment, it is unnecessary to discuss the sufficiency of the evidence to justify the findings, as to which there seems to be some merit in the contention made by appellant.

The judgment is reversed.

Conrey, P. J., and James, J., concurred.

87 Cal. App.—49

[Civ. No. 1766. Third Appellate District.—July 12, 1918.]

**BAPTISTA ALSAGA, Appellant, v. CHARLES F. HART,  
Respondent.**

**CLAIM AND DELIVERY — PLAINTIFF'S OWNERSHIP OF CATTLE — TRANSACTION BETWEEN PLAINTIFF AND THIRD PARTY — PLEADING—AGREEMENT TO SELL.**—In an action in claim and delivery to recover the possession of six head of cows, the plaintiff was not entitled to recover on the theory that he was the owner thereof, where he alleged a transaction between himself and a third party by the terms of which he sold to the latter eight head of horses, and the latter partly paid therefor in cash, and "agreed to sell and deliver" to plaintiff on a stated date six head of cows for the balance, but instead of so doing, sold the cows to the defendant, since such a transaction constituted only an agreement to sell and not an agreement of sale.

**APPEAL** from a judgment of the Superior Court of Lassen County. H. D. Burroughs, Judge.

The facts are stated in the opinion of the court.

F. A. Kelley, for Appellant.

Grover C. Julian, for Respondent.

**HART, J.**—The action here is in claim and delivery. Judgment passed for the defendant and the plaintiff appeals therefrom, on the judgment-roll alone.

The complaint is based on a transaction between the plaintiff and one J. F. Swan in which the former sold to the latter eight head of horses "at an agreed price of \$510," of which amount Swan paid the plaintiff \$150 in money, "leaving a balance of \$360," for the satisfaction of which the said Swan "agreed to sell and deliver to plaintiff on the last day of April, 1917, six head of cows, but instead of delivering said cows to plaintiff as so agreed, J. F. Swan sold said cows to one Charles F. Hart, who now has the possession of all of said cows and wrongfully withholds the possession of all said cows, against the consent of plaintiff." Then follow the usual allegations in an action in claim and delivery that the plaintiff demanded of the defendant, Hart, possession of said cows,

and that the defendant still "unlawfully withholds and detains said cows from the possession of this plaintiff, to his damage in the sum of \$360." The prayer is for the recovery of the possession of said cows, or, in case delivery of such possession cannot be had, for the recovery of the above-mentioned sum, together with \$150 as damages and for costs of suit.

The complaint is unverified and the issues as to the ownership and the right of possession of the cows were made by a general denial of the averments of the complaint.

The court found that the plaintiff and Swan entered into the transaction and agreement as alleged in the complaint, but that the cows were thereafter sold by Swan to the defendant, Hart, "who now has the possession of said cows," and that the defendant is the owner of said cows and is entitled to the possession thereof. Judgment followed as above indicated.

The appellant argues, in support of this appeal, that the transaction between the plaintiff and Swan involved an executed contract—that is, that it constituted an agreement by which Swan sold to the plaintiff the six head of cows in dispute. The complaint, however, pleads no such an agreement between the plaintiff and Swan. "An executed contract is one, the object of which is fully performed. All others are executory." (Civ. Code, sec. 1661.) And "title is transferred by an executory agreement for the sale or exchange of personal property only when the buyer has accepted the thing, or when the seller has completed it, prepared it for delivery, and offered it to the buyer, with intent to transfer the title thereto, in the manner prescribed by the chapter upon offer of performance." (Civ. Code, sec. 1141; see, also, sec. 1140, Civ. Code, as to when the title to personal property passes.)

The contract pleaded involves nothing more than an agreement by Swan to sell and deliver the cows to the plaintiff. In other words, according to the contract pleaded by plaintiff, Swan merely obligated himself to sell the cows to the plaintiff at some future time. There was no agreement of sale, but only an agreement to sell. So far as Swan was concerned, it was purely an executory contract, his part of the same being still unperformed. No title passed, no possession was given or offered, and no present transfer agreed upon and the particular property identified. If the plaintiff has any right of action at all growing out of the transaction, it would be

against Swan for the breach thereof and not against the defendant. It is not expressly charged, nor even impliedly, so far as the defendant is concerned, that there was fraud as against the plaintiff in the transaction between Swan and the defendant. Indeed, so far as said transaction is explained by the complaint, the defendant was a purchaser of the cows in good faith and for a valuable consideration.

But, supposing that what was intended to be alleged in the complaint was that Swan by the agreement had transferred to the plaintiff the title to the cows in question but had postponed delivery of the possession thereof to a future time, and that thus a completed sale had been effected, still the judgment on the record before us cannot be disturbed. The court found that the agreement between the plaintiff and the defendant was precisely as it was made to appear on the face of the complaint—that is to say, that the said Swan, as a part of the consideration for the horses sold to him by plaintiff, “agreed to sell and deliver to plaintiff on the last day of April, 1917, six head of cows,” etc. As above shown, the appeal here is on the judgment-roll alone, there being no record of the evidence before us. The presumption is, therefore, that the evidence justified and supports said finding—that is, that the agreement between Swan and the plaintiff, as the complaint alleges, was one by which Swan agreed to sell at a future time the cattle to the plaintiff and, therefore, not one whereby an absolute sale of the cows was effected. Moreover, so far as we can know from the record, the cows sold to the defendant may not be the same cows which Swan agreed to sell and deliver to the plaintiff.

The appellant has cited a number of cases which we have found, upon examination, do not support his position upon the record in this case. It is not necessary to review those cases herein. The appeal here is absolutely destitute of merit.

The judgment is affirmed.

Chipman, P. J., and Burnett, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on September 10, 1918.

[Civ. No. 1687. Third Appellate District.—July 13, 1918.]

**WILLEY WAHL et al., Respondents, v. H. YORI, Appellant.**

**SALE—OWNERSHIP OF CATTLE—CONFLICT OF EVIDENCE—FINDING—APPEAL.**—In an action to recover the price of certain cattle, wherein the defense on the merits was that the cattle were purchased by defendant from the father of plaintiffs, and hence defendant was not indebted to plaintiffs in any sum, the finding of the jury on such issue on conflicting evidence is conclusive on appeal.

**ID.—EVIDENCE—CONTRADICTORY STATEMENTS CONCERNING OWNERSHIP.**—In such an action, it was permissible to ask the defendant on direct examination to state conversations he had with the father of the plaintiffs concerning the ownership of the cattle for the purpose of showing that the father had made statements contradictory to those to which he had testified.

**ID.—OWNERSHIP OF CATTLE—STATEMENTS INADMISSIBLE.**—In such an action, statements made by the father not in the presence and hearing of the plaintiffs, or either of them, are not admissible for the purpose of showing title in the father.

**APPEAL** from a judgment of the Superior Court of Butte County. H. D. Gregory, Judge.

The facts are stated in the opinion of the court.

J. Oscar Goldstein, for Appellant.

Guy R. Kennedy, and Jerome D. Peter, for Respondents.

**CHIPMAN, P. J.**—Plaintiffs commenced the action to recover the sum of \$830, which it is alleged defendant agreed to pay for twelve head of cows at the agreed price of \$65 per head and two calves at the agreed price of \$25 per head, sold and delivered by plaintiffs to defendant, on or about November 13, 1915. A second count is for the like number of cattle of the reasonable value of \$830.

The answer is a specific denial of the averments of the complaint, except that defendant admits nonpayment.

The cause was tried by a jury and plaintiffs had the verdict for the amount claimed and judgment was entered accordingly. The appeal is from the judgment under the alterna-



tive method and is here on the judgment-roll and the evidence taken at the trial.

The defense on the merits of the case made at the trial was that the cattle in question were purchased by defendant from Albert Wahl, the father of plaintiffs, and hence defendant was not indebted to plaintiffs in any sum. Neither the number nor the value of the animals is controverted.

Plaintiffs were engaged in the business of farming and stock-raising near the city of Chico, Butte County; their father, Albert Wahl, was also engaged in the same business in a different part of the county. Defendant was a tenant of Albert's and had purchased some cattle from him previous to the present transaction. He desired to make further purchase and applied to Albert, who told him his sons, plaintiffs, had cattle for sale. There was testimony that Albert took defendant to plaintiffs' farm, where the latter examined and picked out the animals referred to in the complaint and agreed upon the price to be paid; that the cattle belonged to plaintiffs and that the sale was made and cattle delivered by plaintiffs to defendant. Witnesses for defendant testified that the sale was made by Albert and that plaintiffs took no part in the transaction. Upon the question of ownership of the cattle and as to the person who sold them to defendant the evidence was conflicting. The jury accepted the evidence submitted by plaintiffs as true and so found by their verdict. Under the rule the judgment on the verdict cannot be disturbed by the reviewing court.

The trial court sustained certain objections to evidence offered by defendant, "and," says defendant's brief, "the chief point preserved on this appeal is, that the court committed prejudicial error in the exclusion of evidence offered by defendant."

Albert Wahl had testified to the transaction and that the negotiations were between Henry Wahl, one of the plaintiffs, and the defendant, and that he, Albert, had nothing to do with it and did not own the cattle nor did he sell them to defendant.

Defendant was called as a witness in his own behalf. He was asked to state the conversation he had at that time with Albert Wahl in the presence of Henry Wahl. Objection was made that the question was self-serving and might be in Henry Wahl's presence and not in his hearing. The witness

stated that he did not know whether Henry heard the conversation. Objection sustained. He was then asked if he had any conversation with Albert Wahl in regard to buying the cattle which were delivered to him "by the men of Henry Wahl, or the cattle that came from Henry Wahl's place." Objection that it was irrelevant, incompetent, self-serving, and not in the presence of either of the plaintiffs and not binding on them. "Mr. Goldstein: We allege here we bought no cattle from the plaintiffs and we bought the same cattle from Albert Wahl. The Court: The objection will be sustained. You can show whom you bought the cattle from, if you bought it from a different person." He was then asked what conversation he had with Henry Wahl, and replied that he "didn't have a conversation with Henry Wahl at all; the only conversation was with Albert Wahl. Q. You spoke to Albert Wahl? A. Yes, sir; I spoke to Albert Wahl all the time. Q. When did you have a conversation with Albert Wahl? A. One time I come to Chico, he said it would be a good thing to pay something for the cattle; he said I was making good money and he said I should pay something for the cattle that I bought last time in Dayton," referring to the purchase in question. Objection was made as self-serving and not in the presence of plaintiffs. Sustained and the last answer stricken out. The record shows that defendant consented to the ruling in this instance.

Defendant seems to treat Albert Wahl as the agent of plaintiffs and hence his declarations would bind them. There was no evidence tending to show that Albert was acting as plaintiffs' agent. In fact, defendant's contention is that Albert was the principal—that he owned the cattle and sold them to defendant. The cattle were on plaintiffs' premises and bore their brand. It did not appear that any declarations made by Albert or any of the conversations sought to be brought out were in the hearing of plaintiffs.

In his cross-examination Albert Wahl had said something about a conversation he had with defendant—nothing definite or specific, nothing resembling a proper foundation for impeachment. The purpose of defendant's counsel in asking defendant, as a witness, to state the conversations he had with Albert was doubtless to show that he made statements to defendant contradictory to those to which he had testified. This is permissible sometimes without laying the foundation

for impeachment. (*Doudell v. Shoo*, 20 Cal. App. 424, 449, [129 Pac. 478].) We incline to think for that purpose alone the questions were permissible. But defendant did not ask them at the trial nor does he now urge that they should have been allowed on that ground. His contention is that they should have been permitted to show title in Albert and not in plaintiffs. For that purpose declarations made by Albert not in the presence and hearing of plaintiffs, or either of them, would no more be admissible than the declarations of a stranger. As already suggested, Albert's statements could not bind plaintiffs on the theory of agency, for there was no agency established. Nor were they admissible on the ground of estoppel, for upon no principle would plaintiffs be bound or estopped by conversations between Albert and defendant, of which they were ignorant or to which they did not consent and did nothing and said nothing to lead defendant to believe that they had knowledge thereof or consented thereto. But if error be conceded, there were other witnesses besides Albert Wahl who testified to plaintiffs' ownership of the cattle and that the sale, as well as the delivery, was made by them, upon whose testimony the verdict of the jury may rest. Besides, defendant and other witnesses in his behalf were permitted to testify, and did testify, fully as to the transaction and what took place at the time of the sale. This testimony was to the effect that the barter was entirely between Albert Wahl and defendant and that Henry Wahl had nothing to do with it. Unfortunately for defendant, the jury did not accept this testimony as satisfactory or convincing.

Henry Wahl, witness for plaintiffs, was cross-examined as to a conversation he had with defendant in January, 1916, after this sale of the cattle. He testified that he asked defendant for some money. His attention was then called to meeting defendant in Chico on June 24, 1916, and was asked if he did not then ask defendant "for money to be paid on these cattle. A. He gave me two hundred dollars or a two hundred dollar check to Albert Wahl, and not to me." He testified that he had asked his father for money and was told "that probably Mr. Yori could dig up some"; that he asked defendant for money he had agreed to give his father; that they went into the Butte County National Bank and witness wrote the check and defendant signed it—"Pay to Albert Wahl or bearer"; that he asked for the money for Albert

Wahl; that he did not ask him for money for himself and did not tell him he wanted the money for the cattle he had sold defendant; that defendant told witness to make the check payable to Albert Wahl; that he did not know why it was made payable to Albert unless it was "his indebtedness to Albert Wahl." Further answering: "The only reason was that I would pay the money to my father, and if I could borrow it from my father, I went to him to collect it for him, to borrow it"; that no money was deposited in the bank for plaintiffs' stock.

It appeared from witness' testimony on redirect that defendant was indebted to witness' father and that he wrote the check at defendant's request and as directed by him and delivered the check to Albert Wahl.

In his testimony defendant testified fully to what occurred at this meeting in January, 1916, when this check was given, and that it was made payable to Albert because he owed him and not Henry for the cattle. At this point a check for \$250 was shown defendant and he was asked what he did with it. He answered that it was deposited in bank to the account of Albert Wahl. Defendant then sought to show that it was deposited in part payment for the cattle sold by plaintiffs. Objection was sustained. It is not claimed that plaintiffs got this money or knew anything about the deposit. Albert Wahl knew that the deposit was made and testified that it was on account of defendant's indebtedness to him for rent. The evidence might have had some tendency to contradict Albert's testimony, but it was not offered for that purpose. The object was to show by defendant's act that he purchased the cattle from Albert. In the absence of any knowledge by plaintiffs of the payment or its purpose, we cannot see that they would be bound by defendant's motive in making the payment.

We are unable to discover any prejudicial error in the rulings upon these two checks.

The judgment is affirmed.

Burnett, J., and Hart, J., concurred.

[Crim. No. 443. Third Appellate District.—July 16, 1918.]

**THE PEOPLE, Respondent, v. ROFFI ROSSI, Appellant.**

**CRIMINAL LAW—COMMISSION OF LEWD ACT UPON CHILD—VERDICT WARRANTED BY EVIDENCE.**—In this prosecution for committing lewd and lascivious acts upon and with the body of a female child under the age of fourteen years, it is held that there was sufficient evidence to warrant a verdict that the defendant was guilty of the offense charged, and not of an attempt to commit rape.

**ID.—ARGUMENT OF DISTRICT ATTORNEY—REFERENCE TO DEFENDANT AS "DEBAUCHER"—CONDUCT WITHOUT PREJUDICE.**—In such a prosecution, reference by the district attorney in his argument to the case as one in which the "little girl" had been "debauched" by the defendant and also declaring that the defendant was a "debaucher" is not misconduct.

**ID.—SENTENCE FIXING MAXIMUM TERM OF IMPRISONMENT—CRIME COMMITTED SUBSEQUENT TO INDETERMINATE SENTENCE LAW—UNAUTHORIZED SENTENCE.**—The provisions of section 1168 of the Penal Code relating to indeterminate sentences are applicable to offenses committed subsequent to the enactment, and a sentence fixing the maximum term of imprisonment at twenty years for a violation of section 288 of such code is unwarranted.

**APPEAL** from a judgment of the Superior Court of Placer County, and from an order denying a new trial. J. E. Prewett, Judge.

The facts are stated in the opinion of the court.

K. D. Robinson, and A. J. Harder, for Appellant.

U. S. Webb, Attorney-General, and J. Chas. Jones, Deputy Attorney-General, for Respondent.

**HART, J.**—The defendant was charged by an information with and convicted by a jury in the superior court of Placer County of having committed lewd and lascivious acts upon and with the body of a female child under the age of fourteen years, and prosecutes these appeals from the judgment of conviction and the order denying his motion for a new trial.

The information is based on section 288 of the Penal Code, which reads: "Any person who shall willfully and lewdly

commit any lewd or lascivious act other than the acts constituting other crimes provided for in part two of this code upon or with the body, or any part or member thereof, of a child under the age of fourteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of such person or of such child, shall be guilty of a felony and shall be imprisoned in the state prison not less than one year."

The information charges the offense as follows: "The said Roffi Rossi on or about the seventeenth day of January, A. D. 1918, at the said county of Placer, in the said state of California, and before the filing of this information, did then and there willfully, unlawfully, feloniously, and lewdly, kiss, embrace, hug, and place his hands under the clothes and on and between the legs of one Lucille Orsolini, a female child under the age of fourteen years, with the intent of then and there arousing, appealing to, and gratifying the lust and passion and sexual desires of said child, all of which is contrary to the form, force, and effect," etc.

The point first made by the defendant is that if the defendant was shown by the evidence to have been guilty of any crime at all, it was that of an attempt to commit rape and not that defined by section 288 of the Penal Code. It is hence argued that the verdict cannot stand, because the acts proved come within those "constituting other crimes provided for in part two of" the Penal Code.

The point is without merit.

The child upon whom the alleged lascivious act was committed by the defendant is the daughter of a Mr. and Mrs. Orsolini, residents of Roseville, Placer County, and was, at the time of the commission of said act (the seventeenth day of January, 1918), a little more than nine years of age. The alleged crime was committed in the early morning of the day named at the home of the parents of the child in Roseville, after the father had gone to his work as a machinist in the railroad shops at Roseville and the mother had gone to the city of Sacramento to spend the day. A family by the name of Trott was occupying the house temporarily with the Orsolinis, and Trott was the only person left in the house with the child, Mrs. Trott having also gone to Sacramento that day. Trott was in bed and the little girl was in the kitchen engaged in preparing her own breakfast, when the defendant, for the

purpose, so he claimed, of delivering to Trott a key to a house in Roseville which the latter contemplated leasing for use by himself and family, made his appearance at the Orsolini home. Trott was aroused from a semi-sleeping condition by the noise of persons talking and "rustling around" in the adjoining room, and finally heard a child's voice say: "Don't do that—stop that—it hurts." Trott thereupon went to the bathroom door, from which he could see into the adjoining bedroom, and there he saw the defendant sitting upon the bed, but did not then see the child. Trott then returned to his own room and went back to bed and, within a few minutes thereafter, again heard similar noises to those which he had previously heard, and again he arose and went to the bathroom door, and, looking into the adjoining bedroom, saw the defendant sitting on the bed, holding the child between his legs, with the back part of her clothes up and his left hand under her clothes, while his right hand was around her body. Trott said that the defendant was moving himself "up and down" and holding the child on his lap. Trott, addressing the defendant, asked: "What in hell are you doing there?" whereupon the child broke away from the embraces of the defendant and ran into the adjacent room, exclaiming, as she ran out, "You dirty thing! I told you not to do that." When the child thus got away from the defendant Trott observed that the latter's private parts were out of his pantaloons and exposed.

There was no testimony that the defendant had sexual relations with the child. In fact, the girl testified that he did not insert his private parts into hers, but kissed and hugged her and had his hand under her dress and upon her person. She explained that when she said to the defendant, "Stop that; it hurts," etc., she had reference to his hugging her or pressing her body to his with such force as to make it painful to her.

It requires no argument to demonstrate that, under the facts as they are above briefly detailed, the defendant's acts were those denounced as a crime by section 288 of the Penal Code. It may be true that his intention was to have sexual relations with the child, but there is no evidence that he did have such relations with her, nor is there any proof that he attempted to insert his private parts into hers. But, as is obvious from the above statement of the testimony, there is ample evidence showing that he committed acts of lewdness upon her body—

acts which very naturally are calculated to excite the sexual passions of a child—and it is just such reprehensible conduct that section 288 was designed to punish. If it had been so clearly shown that the defendant attempted to insert his private parts into those of the child that no other conclusion would have been justified by the jury than that he attempted to commit the crime of rape upon the infant, then this court might be required to agree with appellant's counsel that the act committed was one of those "acts constituting other crimes provided for by part two of the" Penal Code, and, therefore, within the exception prescribed by section 288. But as in effect heretofore stated, there is evidence which warranted the verdict returned by the jury, and we are in consequence not at liberty to interfere with the result at which they arrived. (See *People v. Dabner*, 25 Cal. App. 630, [144 Pac. 975].)

The next and last point urged by the appellant for a reversal is predicated upon certain alleged misconduct of the district attorney during the course of his argument to the jury. That officer several times, in his address, referred to the case as one in which the "little girl" had been "debauched" by the defendant and also declared that the latter was a "debaucher." Counsel for the defendant objected to the use of those words by the district attorney, and the court thereupon suggested that the prosecutor omit their use in his argument, saying that if the words were employed by the district attorney in the sense that the defendant had actually had sexual intercourse with the child, the evidence did not justify their use. This statement by the court was itself sufficient to overcome the effect of any damage which the defendant might have otherwise suffered from the use of those words by the prosecutor. But we do not think the district attorney went far afield when he described the defendant as a "debaucher." The evidence, of which we have herein given a statement in substance, discloses the defendant's revolting and beastly acts upon the child, and even though he did not succeed in having actual sexual relations with her, it is fairly and reasonably to be assumed from the evidence that he was not above doing so, and might have carried his lechery that far but for the appearance of the witness, Trott, in the room at a timely moment. We are, however, not so sure that one



doing as the defendant was shown by the evidence to have done in this case may not with propriety be termed a "debaucher." His acts with the child were obviously such as to instill into her childish mind thoughts of the most degrading character and tendency and which are naturally calculated to lead an adolescent, presumably without fixed or correct notions of the principles of morality or a proper appreciation of the appalling significance of the loss of chastity by a female, to the commission of acts of unspeakable depravity. A man responsible for such a state of mind in a young female, who may be assumed, from her immature years, to be mentally irresponsible or without the ability to appreciate the terrible consequences to her of immoral conduct, is, although himself never having been criminally intimate with such child, no less a debaucher than one who has committed upon the child the sexual act itself. A district attorney, however, has the right in argument to build up a theory of his case as it is made by the evidence, and often in doing so he may give expression to thoughts which have been drawn from the realms of his imagination. If thus he keeps within the general character of the case as it is made by the proofs, then he remains within the sphere of legitimate argument. Of course, the prosecutor should not be permitted, in argument, to bring into the case facts vitally bearing upon the charge or the defendant's alleged connection therewith which have no foundation in the evidence, but where the evidence, as here, is such as clearly to warrant the belief that the defendant on trial committed the crime charged, then the prosecuting officer is authorized in argument to assume his guilt and to refer to and characterize him according to the nature or degree of turpitude of the crime of which he is accused. As was said in *People v. Glaze*, 139 Cal. 154, 160, [72 Pac. 965], in reply to an objection that the district attorney abused his rights in his argument to the jury, so it may with equal propriety be said here: "A defendant on trial for murder is not entitled as of right to be spoken of as if he were an innocent man in an argument by the officer who is endeavoring to show his guilt." Hence, it has been well said that, in his address to the jury, a prosecuting officer may descant upon the facts proved or admitted; arraign the conduct of the parties or the witnesses; "impugn, excuse, fortify, or condemn motives, as far as they are developed in the evidence; assail the credibility of wit-

nesses, when impeached by direct evidence, or by the inconsistency or incoherence of their testimony, their manner of testifying, their appearance upon the stand, or by circumstances. His illustrations may be as varied as the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit, or wings to his imagination." (*Tucker v. Heniker*, 41 N. H. 323. See, also, *People v. Molina*, 126 Cal. 505, [59 Pac. 34]; *People v. McMahon*, 124 Cal. 436, [57 Pac. 224]; *People v. Soeder*, 150 Cal. 12, [87 Pac. 1016]; *People v. Weber*, 149 Cal. 325, [86 Pac. 671]; *People v. Wheeler*, 65 Cal. 77, [2 Pac. 892]; *People v. Yee Foo*, 4 Cal. App. 730, 741, 742, [89 Pac. 450].)

No other points are made by the defendant, but the attorney-general has called our attention to an error in the judgment of sentence of which notice herein should be taken. The crime of which the defendant was convicted was, as above shown, committed in the month of January, 1918. The legislature of 1917 passed what is known as the "Indeterminate Sentence" Act, which went into operation in August of said year (see Stats. 1917, p. 665), said law being now section 1168 of the Penal Code.

Section 288 of the Penal Code, of the alleged violation of whose provisions the defendant was convicted, fixes a minimum penalty of not less than one year for the offense defined therein, but does not prescribe or limit to a specific number of years a maximum penalty therefor, so that the punishment may in such a case run from not less than one year to life. The court below, in sentencing the defendant and in its judgment of sentence, fixed the maximum term of imprisonment at twenty years. Such a sentence in this case the court was without authority to impose, since section 1168 of the Penal Code was in operative effect at the time the crime of which the defendant was convicted is alleged to have been committed. (*People v. Gonzales*, 36 Cal. App. 782, [173 Pac. 407].) In that case the defendants were convicted of the crime of robbery committed after section 1168 of the Penal Code became operative, and the court, in sentencing them, fixed the maximum penalty in each case at a specific number of years. The punishment for the crime of robbery is exactly the same as that prescribed for the offense of which the defendant here stands convicted, viz., "by imprisonment in the

state prison not less than one year." This court, in the case above named, among other things, said: "We can see no merit in the claim that the law does not prescribe the maximum penalty for the crime of robbery. The maximum penalty 'prescribed by law' is the extreme penalty that the law authorizes to be imposed—that is, life imprisonment in the present case, as we have seen." The judgment was reversed, "with direction to the lower court to pronounce judgment in accordance with said indeterminate sentence law of 1917." A petition for the hearing of the case by the supreme court after judgment here was denied, and the case is, therefore, controlling upon the question here.

The attorney-general, however, upon a point of practice in a matter of this kind, has called our attention to the case of the *People v. Mendosa*, 178 Cal. 509, [173 Pac. 998], in which the defendant, having been convicted of burglary of the second degree, committed after the indeterminate sentence law became operative, was sentenced by the court to imprisonment in the state prison for not less than one nor more than five years. The maximum punishment for burglary of the second degree is imprisonment for five years in the penitentiary, no minimum penalty being prescribed for said offense. The appellate court of the first district, while holding that the trial court erred in fixing the minimum penalty at one year, further properly held that the error so committed did not have the effect of nullifying the entire judgment, but instead of remanding the case for the purpose of having a proper sentence imposed modified the judgment of sentence by striking therefrom the portion thereof purporting to fix the period of imprisonment. That case was not called to our attention in the *Gonzales* case, nor does it in any way conflict with the conclusion reached in the latter case upon the vital question therein decided, but harmonizes therewith. We do not, however, perceive any reason for holding that the course adopted by the appellate court in the *Mendosa* case is not in such a situation perfectly proper, legally, and certainly it is the better or at least the less inconvenient and troublesome course to follow. We shall, therefore, adopt it in this case in preference to returning the case to the court below for the imposition of a proper sentence.

Accordingly, the portion of the judgment of sentence herein which attempts and purports to fix the maximum penalty at

twenty years is stricken from said judgment, and as so modified the judgment appealed from, as well as the order, likewise attacked here, denying the defendant's motion for a new trial, are affirmed.

Chipman, P. J., and Burnett, J., concurred.

---

[Civ. No. 2699. Second Appellate District.—July 22, 1918.]

**JEAN H. BAKEMAN**, Petitioner, v. **SUPERIOR COURT OF THE COUNTY OF LOS ANGELES et al.**, Respondents.

**CONTEMPT—ORDER TO SHOW CAUSE—PERSONAL APPEARANCE.**—An order adjudging a person in contempt of court for failing to appear in person in response to an order to show cause is unwarranted and in excess of the jurisdiction of the court where appearance is made by her attorney and presentation of her affidavit showing inability to comply with the order of the court.

**ID.—PUNISHMENT FOR CONTEMPT—ABILITY TO COMPLY WITH ORDER.**—An order adjudging a person in contempt of court for failure to perform an act directed by the court is void, as a basis for the imposition of punishment, unless it appears that it is within the power of such person to perform the act.

**APPLICATION** originally made to the District Court of Appeal for the Second Appellate District for a writ of prohibition to restrain the Superior Court from pronouncing judgment for contempt.

The facts are stated in the opinion of the court.

H. S. Laughlin, and Muhleman & Crump, for Petitioner.

L. B. Stanton, for Respondents.

**SHAW, J.**—Prohibition. It appears from the petition and the return made in response to the alternative writ issued herein that in an action wherein J. F. Brunund was plaintiff and petitioner and others were defendants, the court made an order requiring petitioner, within the time therein

specified after service of the same, to deliver to the clerk of the court certain promissory notes and stock certificates, the right to the possession of which was claimed by plaintiff, the same to be held by the clerk pending further orders of the court.

Upon an affidavit filed setting forth the fact of the making of the order, due service thereof, and petitioner's neglect to comply therewith, she was, by an order of court made on February 9, 1918, cited to appear on the eleventh day of March, 1918, and show cause why she should not be adjudged guilty of contempt for disobedience of the order, which citation was duly served on February 15, 1918.

On March 11, 1918, the matter coming on for hearing, petitioner, in obedience to the order appeared, not in person, but by attorney, and filed an affidavit wherein she averred that prior to the commencement of the action she had transferred the notes and stock to a resident of San Francisco, since which time she had had no control thereof, and that petitioner was and at all times had been without power to comply with the order of the court. At this hearing no evidence, other than petitioner's affidavit showing her inability to comply with the order, was received. Nevertheless, the court made an order as follows: "In matter of order of Jean H. Bakeman to appear and show cause *in re* contempt, which comes on now to be heard, said defendant not being present in court is adjudged in contempt and a bench warrant is ordered to issue returnable forthwith."

Thereafter, on April 10th, petitioner appeared in court personally with her counsel; whereupon the court continued the hearing of said contempt proceedings to the twelfth day of April, 1918, at which time the court made an order as follows: "In the matter of order to show cause *in re* contempt, which comes on now for hearing, L. B. Stanton appearing as attorney for plaintiff, and H. S. Laughlin appearing for defendant, Jean H. Bakeman is sworn and examined and plaintiff's exhibit number one is filed. Thereupon the hearing is continued to April 29, 1918, and defendant is ordered to produce at that time the stock described in the complaint."

At the hearing on the 29th of April the court made an order as follows: "The defendant having failed to obey the order hereinbefore made directing her to bring into court cer-

tain certificates of stock in her possession, and at her request in open court the matter having been continued to this time, and she not appearing, she is now adjudged guilty of contempt of court, a bench warrant is ordered to issue for her arrest, but the service thereof is withheld until May 28, 1918, to which date this matter is continued." It is alleged in the petition that the Honorable Grant Jackson, as judge of said superior court, has announced his intention to and will, unless prohibited from so doing, punish petitioner for her disobedience of said order and for her nonappearance in person upon the hearings of the orders to show cause hereinbefore set forth; and in its return the court asks to have the alternative writ discharged "to the end that respondent may further proceed in the said cause of *Grumund v. Bakeman*," which further proceeding we assume is the pronouncing of judgment based upon and in accordance with the orders wherein petitioner was adjudged guilty of contempt.

In response to the order made February 9, 1918, to show cause, petitioner was not required to appear personally. (*Ex parte Gordan*, 92 Cal. 478, [27 Am. St. Rep. 154, 28 Pac. 489]; *Gordan v. Buckles*, 92 Cal. 481, [28 Pac. 490].) A sufficient appearance was made by her attorney, who, in response to the order to show cause, presented her affidavit showing that she was then, and since prior to the commencement of the action had been, unable to comply with the order, which fact, as to the notes, is shown by the complaint in the action wherein it is specifically alleged "that said Jean H. Bakeman has transferred to a party or parties unknown to this plaintiff but well known to said Jean H. Bakeman, said and each and all of said notes so executed by said plaintiff as aforesaid; . . . said transferee has and had at the time of said transfer full knowledge of the transactions between said plaintiff and said Jean H. Bakeman." Hence, the first order made on March 11th, adjudging petitioner guilty of contempt for failing to appear in person, was, upon the authorities cited, unwarranted and in excess of the jurisdiction of the court.

The order made April 29th purports to adjudge petitioner guilty of contempt for failure to produce and deliver the certificates of stock in accordance with the direction made on April 12th requiring her so to do, and for such failure it was further ordered that a warrant issue for her arrest upon

which, as admittedly appears, judgment would be pronounced committing her to jail or subjecting her to a fine. The question, therefore, is whether this last order, made on April 29th, is sufficient to warrant the imposition of the threatened punishment. In our opinion, it is not, for the reason that petitioner could not, upon the showing of cause made by her affidavit, be in contempt in the absence of a finding or adjudication to the effect that she was then able to comply therewith. There is an absence of any recital or finding in the order or elsewhere that the petitioner had the ability to comply with the order of court referred to therein. An order adjudging one guilty of contempt for failure to perform an act directed by the court is void as a basis for the imposition of punishment, unless it appears therefrom that it is within the power of such person to perform the act. (*Ex parte Silvia*, 123 Cal. 293, [69 Am. St. Rep. 58, 55 Pac. 899]; *In re Cowden*, 139 Cal. 244, [73 Pac. 156]; *Egübert v. Superior Court*, 6 Cal. App. 190, [91 Pac. 748]; *Ex parte Cohen*, 6 Cal. 319; *Galland v. Galland*, 44 Cal. 475, [13 Am. Rep. 167].)

Had petitioner sought a review of these orders adjudging her guilty of contempt, it would have been the duty of this court to annul the same for want of recital or finding that she was able to comply with the orders. This being true, it follows that the court upon this application should be prohibited from further proceedings which must necessarily be based upon orders which, for the reasons stated, are void.

The alternative writ of prohibition heretofore issued is made peremptory.

Conrey, P. J., and James, J., concurred.

[Civ. No. 1820. Third Appellate District.—July 23, 1918.]

J. H. TUCKER, Respondent, v. T. B. HAGERTY, as  
Constable, etc., Appellant.

**CLAIM AND DELIVERY—DAMAGES—USABLE VALUE OF PROPERTY.**—In an action for the wrongful detention of property, the ordinary measure of damages is interest, but where the property has a usable value which exceeds the lawful rate of interest, such rule has no application, and the successful party is entitled to recover, as damages for the detention, the value of such use during the period that he was wrongfully deprived thereof, which value is to be estimated by the ordinary market price of the use of the property.

**ID.—RECOVERY OF POSSESSION OF AUTOMOBILE—WRONGFUL SEIZURE BY OFFICER—RENTAL VALUE AS DAMAGES.**—In an action in claim and delivery to recover the possession of an automobile wrongfully seized by an officer under a writ of attachment, the trial court is authorized under section 667 of the Code of Civil Procedure to fix damages for detention on basis of rental value, although it amounts to more than the value of the machine.

**APPEAL** from a judgment of the Superior Court of Sacramento County. Chas. O. Busick, Judge.

The facts are stated in the opinion of the court.

Shelley & Johnston, for Appellant.

Frank A. Prior, for Respondent.

**CHIPMAN, P. J.**—Plaintiff brings the action in claim and delivery. In his amended complaint he alleges that defendant is the duly elected, qualified, and acting constable of Sacramento Township, Sacramento County, and that, on the twentieth day of July, 1917, as such constable, defendant wrongfully took possession of a certain automobile under a writ of attachment, in a certain action, pending in said township, wherein Vina Hall is plaintiff and P. A. Smitcamp and Sadie M. Smitcamp are defendants; that, on July 21, 1917, plaintiff "made a verified demand upon said constable for the release of said automobile from the lien of said attachment, and of the said automobile so attached aforesaid by defendant, but defendant then and there failed, refused, and neglected and ever since has failed, refused, and neg-



lected to release said attachment, or said automobile, and the possession of said automobile is wrongfully held by said defendant"; that plaintiff at all the times mentioned in said complaint has been, and still is, the owner and entitled to the possession of said automobile; that the value of said automobile is \$650, and that "plaintiff purchased said automobile from Sadie N. Smittcamp and Alice Tanner on the nineteenth day of June, 1917, and paid therefor the sum of \$350"; that plaintiff paid one Mrs. Hall the sum of \$125 to discharge a lien held by her on said automobile; that plaintiff has expended the sum of \$153.75 for necessary tires and other equipment of said automobile; that the rental value of said automobile is \$10 per day. The prayer is for possession, "or for its value if delivery cannot be had, with damages for the detention of said automobile, and for costs of suit." The complaint is duly verified.

Defendant, in his answer, justifies under the attachment referred to in the complaint; denies plaintiff's alleged ownership or right of possession; denies that plaintiff made demand for the release of said attachment; "denies that the value of said automobile is the sum of \$650," but does not aver the value; denies that plaintiff purchased the automobile from the persons as alleged or for the sum as alleged "or any other sum"; admits the payment of \$125 to Mrs. Hall as alleged, but denies that it was secured by lien on said automobile; denies that plaintiff has expended the sum of \$153.75 for repairs or otherwise on said machine, or any sum whatever; denies that the rental value of said automobile was \$10 per day "or any other or greater sum than four dollars per day."

The cause was tried by the court without a jury. By a minute order the court ordered judgment in favor of plaintiff for the return of the automobile, "or in lieu thereof, plaintiff is to receive the sum of \$450 from defendant as the price of said automobile, and it is further ordered that plaintiff do have and recover from defendant damages for the detention of said automobile at the rate of five dollars per day from the twenty-first day of July, 1917, to the date hereof, amounting to the sum of \$585." Findings were waived and judgment was entered in accordance with said minute order.

Notice of motion for a new trial was served and filed and at the hearing the court, on December 3, 1917, ordered that the "motion will be granted unless plaintiff files in court his written consent within five days to accept four dollars per day as damages in lieu of the damages heretofore ordered." Such consent was duly filed, December 8, 1917, but the motion for a new trial was not denied until December 31, 1917. Defendant served notice of appeal, December 12, 1917, from the order made on December 3, 1917, and from the judgment, but did not appeal from the order of December 31, 1917, denying motion for a new trial. There is no bill of exceptions or statement in support of the motion. The case is here on the judgment-roll alone and without findings of fact, which were waived.

The only question presented by appellant relates to the measure of damages. His contention is that damages for the detention of the property, in the absence of circumstances of aggravation or malice, "is legal interest on the value of the property detained, within a reasonable time after the property was taken."

The judgment is "that plaintiff have and recover of said defendant the sum of four hundred fifty dollars the value thereof; and that plaintiff do have and recover of said defendant damages for the detention of said automobile at the rate of five dollars per day from the 21st day of July, 1917, to the date hereof (November 15, 1917), amounting to the sum of five hundred eighty-five dollars, together with plaintiff's costs."

Respondent's contention is that appellant is seeking to apply the rule in conversion, whereas "in an action for claim and delivery the rule is different, the plaintiff is entitled to judgment for possession of the personal property, or the value thereof, and damages for the detention, which damages for the wrongful detention may be fixed by the court in a certain sum."

It is quite clear that the court fixed the damages on the basis of the rental value per day of the automobile. The admission of defendant justifies the fixing of this value at four dollars per day, but it does not necessarily admit that it was the proper measure of damages in the case.

The ordinary measure of damages for the wrongful detention of property is interest. Where, however, the property

has a usable value which exceeds the lawful rate of interest this rule has no application. In such a case the successful party is entitled to recover, as damages for the detention, the value of such use during the period that he was wrongfully deprived thereof. And this value is to be estimated by the ordinary market price of the use of such property. (34 Cyc. 1562-1564.) There are exceptions to this rule, but as there is neither evidence nor finding from which it may be ascertained whether or not the case falls within any of the exceptions, we must apply the rule as above stated.

It is to be observed that we have a statute specifically defining the measure of damages in actions for the conversion of personal property, viz.: "The value of the property at the time of the conversion, with the interest from that time, or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party." (Civ. Code, sec. 3336.) The rule in claim and delivery (or replevin) is as follows: "In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery cannot be had, and damages for the detention." (Code Civ. Proc., sec. 667.)

The reason for the rule in replevin is that interest or the value of the property does not furnish adequate compensation for the wrongful detention. In some of the cases it is correctly said that the wrongdoer who had had the use of the property would make a profit out of his own wrong, which the law does not tolerate; and that it would deny to a plaintiff damages which naturally and certainly follow from a wrongful invasion of his rights. In the notes to the text (34 Cyc. 1563) the rule as above given is shown to have been applied in the case of household furniture; to buggies; boats; milk cows; threshing-machines, in the latter case holding that "the measure of damages for such detention is the fair rental value of the machine, less the damages which would result to it from the extra wear and tear caused by the use of it while so rented." (*Peerless Machine Co. v. Gates*, 61 Minn. 124, [63 N. W. 260].)

The reason for the distinction between trover or conversion and replevin is well stated in *Farrar v. Eash*, 5 Ind. App. 238, [31 N. E. 1125]: "In replevin plaintiff never

ceases to claim the property as his own, but seeks to obtain it rather than its value. In such case plaintiff, being entitled to the use of the property of which he has been unlawfully deprived, and not having waived the title thereof, has a right to recover the value of such use in damages. In trover, on the other hand, plaintiff concedes a change of title by the act of conversion and recognizes ownership in defendant. In that case damages for detention are waived, and it would be absurd to give plaintiff compensation for the use of the property." (34 Cyc., *supra*.)

It may be that damages which cannot be ascertained with reasonable certainty, or which are contingent or speculative, cannot be allowed in an action of replevin. But here we have a distinct claim in the complaint for the rental value, \$10 per day, for the machine, and a denial that the rental value was any greater than four dollars per day. We must assume that there was sufficient evidence to support the judgment upon this issue of rental value as being the damages for the detention. There is nothing so startling in the fact that the rental value allowed by the court amounts to more than the value of the machine as to compel a reversal of the judgment.

We have examined the cases cited by appellant in support of his contention. He cites also section 3336 of the Civil Code, which, as we have seen, by its terms is made applicable to cases of conversion. Some of the cases cited by appellant were in conversion; others were in trespass. *Phelps v. Owen*, 11 Cal. 25, grew out of an attachment and subsequent sale of the property (stock of goods). The complaint in the action claimed no other damages than for the taking and conversion. The rule in that case was held to be that which governs in trespass where the levy by the sheriff was made without any motive of oppression, or wanton disregard of the duties of his office, or the rights of the owner. The rule there was the value of the property with interest. *Dorsey v. Manlove*, 14 Cal. 553, was a case where the sheriff seized certain three horses and sold them to satisfy an assessment for state and county taxes. The action was in trespass. The plaintiffs were allowed to prove that they sustained, in addition to the loss of the property taken, certain injuries resulting consequentially and witnesses were allowed to testify to the amount of the damages. The defendant justified as

sheriff, but the trial court excluded from the jury all evidence relating to the assessment on the ground that the assessment was illegal. This placed the defendant before the jury in the position of a naked trespasser and the result was a verdict for plaintiff for two thousand dollars in damages. The value of the horses taken was \$350. On appeal the judgment was reversed and the rule in *Phelps v. Owen*, *supra*, was held applicable. Obviously, these cases do not govern the present case. *Page v. Fowler*, 39 Cal. 412, [2 Am. Rep. 462], was an action in claim and delivery for certain hay which plaintiff sold after getting possession under the writ. He failed in the action to establish his right to the hay, and, of course, defendants were entitled to recover the value of the hay taken and disposed of by plaintiff. It was sold in San Francisco, in 1863, at \$12.50 per ton, the highest price that could have been obtained. The market value of the hay was two thousand five hundred dollars. Defendants were allowed to prove that hay had sold during the year 1864 for \$40 per ton, and the trial court instructed the jury that they might find the highest market value, since the hay was taken by the plaintiff, with interest. The jury brought in a verdict for \$25,763.23. The trial was in November, 1869, six years after the taking. The judgment was reversed. The opinion is by Mr. Justice Temple and presents a very full analysis of the cases. The rule deduced was "that in cases affecting property of fluctuating value, where exemplary damages are not allowed, the correct measure of damages is the highest market value within a reasonable time after the property was taken, with interest compounded from the time such value was estimated." The opinion states: "We are not called upon to inquire whether a different measure of damages should be adopted where the property has been retained and can be returned in specie."

*Freeborn v. Norcross*, 49 Cal. 313, was claim and delivery, and the appeal was on the judgment-roll alone. The jury rendered a verdict for the value of the property, with "legal interest" thereon from the time of the seizure by the sheriff to the date of the verdict; and damages in the sum of \$50. At that time section 200 of the Practice Act authorized the recovery of damages for the detention of personal property, as section 667 of the Code of Civil Procedure now does. It was held that plaintiff could not recover both interest and

damages; that interest is given in such case as damages and, if allowed in addition to a gross sum for damages, it would amount to double damages. The cause was remanded with directions to modify the judgment "so that plaintiff shall recover the sum of \$375, with interest thereon (the rate specified in section 1920 of the Civil Code) from the date of the judgment." Why the court allowed interest instead of the \$50 as the damages does not appear. Nor does the case decide that damages other than interest, if proven, may not be allowed. The evidence was not brought up. The report of the case is brief and it does not appear whether the interest allowed was more or less than the gross damages of \$50.

In *Kelly v. McKibben*, 54 Cal. 192, interest was allowed in the judgment upon the value of the property from the time it was taken from the possession of defendant. The court said: "As no other damages for the detention are found or included in the judgment, we think that such interest may be regarded as damages for such detention. (*Freeborn v. Norcross*, 49 Cal. 313.)" Upon rehearing the court pointed out the distinction between common-law actions of *detinue* and *trover*, holding that in replevin damages were given under section 667 of the Code of Civil Procedure and not under section 3336 of the Civil Code. (See *Harris v. Smith*, 132 Cal. 316, [64 Pac. 409]; *Hickey v. Coschina*, 133 Cal. 81, [65 Pac. 313]; *Morris v. Allen*, 17 Cal. App. 684, [121 Pac. 690].)

*Livestock Co. v. Union etc. Co.*, 114 Cal. 447, [46 Pac. 286], was an action in replevin. The trial court found that "the plaintiff has not suffered any damages by reason of the detention of said personal property nor have the defendants been guilty of oppression, fraud, or malice." Plaintiff was allowed the value of the property with costs of suit. Plaintiff moved for a new trial, which was granted, and defendant appealed. The record showed without conflict that plaintiff had been damaged in a very considerable sum. The motion was granted on the ground that the evidence was insufficient to justify the decision. The supreme court, in affirming the order, said: "Under such proof (oppression, fraud, or malice) plaintiff might have been awarded exemplary damages (Civ. Code, sec. 3294), but without it was entitled to such damages as would compensate him for all

the detriment proximately caused by the wrong complained of. (Civ. Code, sec. 3333.)”

We think the trial court was authorized to fix the damages for the detention of the property, under section 667 of the Code of Civil Procedure, on the basis of the rental value.

The judgment is affirmed.

Burnett, J., and Hart, J., concurred.

---

[Civ. No. 2283. Second Appellate District.—July 23, 1918.]

M. E. DUTWILER, Respondent, v. A. J. KLUNK et al.,  
Copartners, Appellants.

**SPECIFIC PERFORMANCE—CONTRACT FOR CARLOAD OF IRON—UNCERTAINTY AS TO QUANTITY.**—A contract for a carload of iron is enforceable, notwithstanding the parties in making the contract did not state how much iron should constitute a carload and did not attempt to provide what should be either the minimum or maximum amount of iron in such carload.

**APPEAL—ALTERNATIVE METHOD—PRINTING OF RECORD IN BRIEFS.**—Where the record on appeal has been prepared in typewritten form under the alternative method provided by sections 953a et seq. of the Code of Civil Procedure, the parties must print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court.

**APPEAL** from a judgment of the Superior Court of Los Angeles County. Fred H. Taft, Judge.

The facts are stated in the opinion of the court.

Ward Chapman, and L. M. Chapman, for Appellants.

Barstow, Rohe & Jeffers, for Respondent.

**CONREY, P. J.**—The defendants were engaged in selling a certain kind of patented camp stove. In order to obtain a supply of stoves for the market they agreed with the plaintiff that the plaintiff would obtain a carload of iron and manufacture that iron into stoves, for which the defendants

would pay to the plaintiff seventy-five cents per stove. The stoves were to be made in accordance with certain dies which the defendants were to furnish and did furnish. After a part of the stoves had been delivered and paid for, the defendants, with plaintiff's consent, shipped the dies to Chicago for the purpose of using the same in manufacturing a quantity of stoves there, but with a promise to return the same to the plaintiff to complete his contract. These dies never were returned to the plaintiff. Of the iron remaining in the plaintiff's hands a part had been blocked out for stoves and a part was untouched. The judgment, which was in favor of the plaintiff, covers a sum allowed for depreciation in value of the iron which had been blocked out and a sum covering the profits which the plaintiff would have made if the contract had been fulfilled. The defendants appeal from the judgment.

The principal grounds of appeal urged by the defendants are the following: 1. The contract was void for uncertainty in the attempted specification of the quantity of iron authorized to be ordered, and was therefore unenforceable in so far as uncompleted stoves were concerned. 2. The evidence does not support the finding that defendants agreed to purchase more than the number of stoves to be made from a minimum car of forty thousand pounds, to wit, approximately three thousand five hundred stoves. 3. The judgment for depreciation in value of the cut-up iron and loss of prospective profit was unwarranted, because the contract was not performed nor was performance prevented by defendants. On the contrary, plaintiff himself breached the contract and abandoned the same when he loaned or sold a part of the metal ordered for the performance of his contract. 4. The court erred in declining to allow defendants an opportunity to procure the original freight bill of the car in question and thus prove the weight of the metal delivered.

We have not been favored with a printed copy of the court's findings, but from the evidence produced in the brief we infer that the weight of the iron in that carload was found to be 49,618 pounds. There was evidence tending to show that such was the true weight. Appellants claim that their order was limited to a minimum carload and that a minimum carload of iron would have weighed only forty thousand pounds. The evidence was amply sufficient to sup-



port the court's conclusion that the contract simply provided for a carload of iron without limiting the quantity to any specified weight. Taking this to be the fact, we think that the contract was enforceable, notwithstanding the fact that the parties in making their agreement did not state how much iron should constitute a carload and did not attempt to provide what should be either the minimum or maximum amount of iron in such carload. In the case of a contract for nine carloads of lumber it was held by the appellate court of Indiana that the parties might contract for nine carloads without specifying the capacity of the cars. (*Indianapolis Cabinet Co. v. Herrman*, 7 Ind. App. 462, [34 N. E. 579].)

On cross-examination of the plaintiff he admitted that after the carload of iron came into his possession and before the dies were taken away by the defendants, the plaintiff loaned thirty bundles of the iron to another corporation. After about six weeks this iron was returned by the borrower to the plaintiff. During that period of six weeks the defendants took away the dies for the stated purpose of sending them away temporarily for the special purpose stated above. They were informed at that time that these thirty bundles had been loaned to another establishment, but they made no objection thereto. On the contrary, the defendants treated the contract as still in force and promised that they would return the dies within a stated time. Our attention has not been called to any evidence tending to show that the act of the plaintiff in lending these thirty bundles of iron, amounting to about four thousand five hundred pounds, caused any delay or in any manner interfered with the plaintiff's performance of his contract. These facts, therefore, do not furnish any valid ground for appellants' claim that the judgment for depreciation in value of the cut-up iron and the loss of prospective profits was unwarranted.

The last point argued in appellants' brief relates to an alleged error in ruling upon the admission of evidence. No part of the record upon this question has been printed in that brief or in the brief of the opposing party. They disagree about the facts, and the matter in dispute is not properly before us for determination. Where the record on appeal has been prepared in typewritten form under the alternative method provided by section 953a et seq. of the Code of Civil Procedure, the parties must "print in their briefs,

or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court." (Code Civ. Proc., sec. 953c; *Barker Bros. v. Joos*, 36 Cal. App. 311, [171 Pac. 1085].)

The judgment is affirmed.

James, J., and Works, J., *pro tem.*, concurred.

---

[Crim. No. 608. Second Appellate District.—July 27, 1918.]

THE PEOPLE, Respondent, v. F. S. HARTWELL,  
Appellant.

**CRIMINAL LAW—COMMISSION OF LEWD ACTS UPON CHILD—ACCUSATORY STATEMENTS OF WIFE OF DEFENDANT—FAILURE TO MAKE REPLY—ERRONEOUS ADMISSION IN EVIDENCE.**—In a prosecution for the offense defined in section 288 of the Penal Code, the admission in evidence, over defendant's objection, of the testimony of an officer as to what transpired on the occasion of a visit made by defendant to his home was error where such testimony was to the effect that the defendant's wife told the defendant that he had "been warned about this thing before" and that she did "not believe in this thing of ruining young girls," and the defendant made no reply thereto other than saying that "this is not any place to discuss that."

**ID.—SILENCE OF ACCUSED IN PRESENCE OF ACCUSATIONS—RULE AS TO ADMISSIBILITY.**—Statements of third parties made to or in the presence of one charged with the commission of a crime and tending to connect him therewith are admitted, not as of themselves constituting evidence of the facts stated, but to show what it is that calls for a reply; and where the statement is such that under the circumstances the accused, if innocent, should repudiate it, his remaining mute will constitute evidence of his admission of the truth of the statement made.

**ID.—WARNING OF ACCUSED—ADMISSION—INSUFFICIENT EVIDENCE OF LASCIVIOUS NATURE.**—In such a prosecution, admissions of the accused that he had been warned is not, in the absence of evidence showing reason or occasion therefor, evidence tending to prove that defendant was of a lascivious nature, or that he had theretofore indulged in such acts.

**ID.—ERRONEOUS ADMISSIONS OF ACCUSATORY STATEMENTS—ARGUMENT OF DISTRICT ATTORNEY—PREJUDICIAL ERROR.**—In such a prosecu-

tion, the erroneous admission of accusatory statements of the wife of the defendant was prejudicial where the district attorney laid great stress on the statements in his argument.

APPEAL from a judgment of the Superior Court of San Diego County, and from an order denying a new trial. T. L. Lewis, Judge.

The facts are stated in the opinion of the court.

L. E. Dadmun, for Appellant.

U. S. Webb, Attorney-General, Joseph L. Lewinsohn, Deputy Attorney-General, and Jerry H. Powell, for Respondent.

SHAW, J.—Upon an information charging him therewith, defendant was convicted of the offense defined in section 288 of the Penal Code.

On his appeal prosecuted from the judgment and an order denying his motion for a new trial, numerous alleged errors are argued in support of a reversal, only one of which, however, we deem it necessary to consider.

In the course of the trial the court, over defendant's objection, admitted in evidence the testimony of Officer Cooley as to what transpired on the occasion of a visit made by defendant to his home, as follows: "We went into the house . . . and his wife and daughter were there, and his daughter says, 'Well, you don't need to tell us what you are here for,' or words to that effect. 'We already know about it.' Then Mr. Hartwell said he had to have bail or bonds, and asked his wife if she would go on his bonds. She said she didn't know whether she would or not. And they talked back and forth there about the bonds, and she said: 'You have been warned about this thing before now; you have been warned time and time again, and I do not believe in this thing of ruining little girls. I don't know whether I want to go on your bonds or not, as all I have got is this place.' She said, 'I never had a dollar of my own and you never gave me a dollar.'" In reply to which defendant said: "This is not any place to discuss that." "He says to his daughter, 'You get your mother to sign the bonds and get me out of jail.'"

In our opinion, the ruling constituted error. Statements of third parties made to or in the presence of one charged with the commission of a crime and tending to connect him therewith are admitted, not as of themselves constituting evidence of the facts stated, but to show what it is that calls for a reply; and where the statement is such that under the circumstances the accused, if innocent, should repudiate it, his remaining mute will constitute evidence of his admission of the truth of the statement made. (*People v. McCrea*, 32 Cal. 98; *People v. Philbon*, 138 Cal. 530, [71 Pac. 650].) Other than saying "this is not any place to discuss that," defendant made no reply to what his wife said. The word "that" might well be deemed to refer to her statement that she "never had a dollar of my own and you never gave me a dollar." Assuming, then, that she said "you have been warned about this thing before now," and that she did not believe in ruining little girls, neither statement constituted an accusation of doing anything which defendant was called upon to deny, and assuming further that by remaining mute he be deemed to have assented to all that his wife said, it at most would constitute an admission on his part of the truth of his wife's expressed belief and the fact that he had been warned against committing offenses of a similar character to that with which he was charged. Since, however, the statements made by the wife, if true, did not purport to in any manner connect him with the offense, his assent thereto could not be deemed evidence tending to prove his guilt. Nor, conceding the competency of evidence of prior lascivious acts, as held in *People v. Love*, 29 Cal. App. 521, [157 Pac. 9], can the admission that he had been warned, in the absence of evidence showing the occasion or reason therefor, be deemed evidence tending in any degree to prove that he was of a lascivious nature or that he had theretofore indulged in such acts. One entirely innocent of ever committing a crime might be warned against so doing; indeed, one of the chief purposes of education is the teaching of obedience to laws having their basis in the principles of morality which govern civilized people.

By reason of the nature of the case, the evidence so erroneously received was not only highly prejudicial, but the effect thereof on the minds of the jurors was no doubt greatly accentuated by the argument of the district attorney, based,

not upon the defendant's acts and conduct, but upon this hearsay testimony of his wife. In his discussion of the case he laid great stress upon the fact that, as shown by the statements of the wife and daughter, they knew that defendant was given to the commission of acts like that with which he was charged. True, an objection to this line of argument was sustained, after which the district attorney again directed the attention of the jury to the fact that the wife said, "I do not believe in ruining little girls; you have been warned of this time and time again"; and closed by saying, "I am going to leave it to the jury to say what she meant." Our conclusion renders it unnecessary to consider other alleged errors.

The judgment and order are reversed.

Conrey, P. J., and James J., concurred.

---

[Civ. No. 2502. Second Appellate District.—July 29, 1918.]

R. M. BEKINS, Appellant, v. ELLA SMITH, etc.,  
Respondent.

APPEAL—ORDER DENYING MOTION TO STRIKE OUT STAY BOND—DISPOSITION OF MAIN APPEAL—MOOT QUESTION.—An appeal from an order denying a motion to strike out an undertaking on appeal staying execution and to vacate the stay will be dismissed, as involving questions of only abstract interest, where the appeal from the judgment in the main case has been determined, and the action of the appellate court thereon has become final.

APPEAL from an order of the Superior Court of Los Angeles County denying a motion to strike out an undertaking on appeal staying execution and to vacate the stay. Fred H. Taft, Judge.

The facts are stated in the opinion of the court.

Winslow P. Hyatt, and David G. Kling, for Appellant.

R. D. McLaughlin, J. B. McLaughlin, and Earl Rogers, for Respondent.

THE COURT.—In this action plaintiff had judgment in the court below and defendant Ella Smith appealed. An undertaking was given to stay execution and a stay followed. Plaintiff moved to strike out the undertaking and vacate the stay. That motion was denied and this appeal was then taken. The appeal in the main case has been determined by this court and the judgment of the lower court reversed. (*Bekins v. Smith et al.*, ante, p. 222, [174 Pac. 96].) The judgment made on determining that appeal has become final. It would serve no purpose affecting the rights of the parties litigant to now take up the questions discussed as to the validity of the stay bond given in the case. Such questions have become of mere abstract interest. (*Adams v. Prather et al.*, 176 Cal. 164, [167 Pac. 867].)

The appeal is dismissed.

---

[Civ. No. 2629. Second Appellate District.—July 29, 1918.]

EMIL FIRTH et al., Appellants, v. HOWARD W. BOHRMANN et al., Respondents.

HIGHWAY—ABANDONMENT—RIGHT OF BOARD OF SUPERVISORS.—In view of the provisions of subdivision 3 of section 2643 of the Political Code, a board of supervisors may, of its own motion and without any petition therefor, order a public road abandoned.

ID.—PETITION FOR ABANDONMENT—GENUINENESS OF SIGNATURES—QUALIFICATION OF SIGNERS—JURISDICTION OF BOARD OF SUPERVISORS.—On proceedings for the abandonment of a public road, the genuineness of the signatures and qualifications of the signers of the petition for the abandonment are questions to be determined by the board of supervisors, and in making such determination the board acts judicially.

ID.—FINDINGS OF BOARD—SUFFICIENCY OF EVIDENCE—PRESUMPTION ON COLLATERAL ATTACK.—Where a hearing to abandon a public road is regularly had upon a petition sufficient in both form and substance, it will be presumed on collateral attack that the evidence was ample to establish the truth of the board's findings as to the genuineness of the signatures and the qualification of the signers of the petition.

ID.—ABANDONMENT OF ROAD—PROCEEDINGS NOT SUBJECT TO COLLATERAL ATTACK.—The action of a board of supervisors abandoning

a public road at a hearing regularly had upon a sufficient petition cannot be collaterally attacked because of error in adjudication of a question of fact, not procured by fraud extrinsic or collateral to such question.

**APPEAL** from an order of the Superior Court of Los Angeles County denying a new trial. John W. Shenk, Judge.

The facts are stated in the opinion of the court.

Sheldon Borden, George H. Moore, and Jas. B. Redd, for Appellants.

A. J. Hill, County Counsel, and Chas. E. Haas, Deputy County Counsel, for Respondents.

**SHAW, J.**—In this action plaintiff sought a judgment enjoining defendants from working, improving, and using a certain strip of land as and for a public road.

Judgment went for defendants. Thereafter plaintiff's motion for a new trial was by the court denied, from which order he prosecutes this appeal.

It appears that in May, 1909, plaintiff Firth was the owner of a tract of land comprising over four hundred acres which, under the designation of "Orange Cove," he subdivided into lots ranging from five to eighteen acres each. Over this tract at said time there extended a meandering public road known as the Vinedale road. On May 19, 1909, there was presented to the board of supervisors a petition in due form and substance, signed by ten persons who therein represented themselves as being freeholders, and praying that said road be abandoned and vacated. After notice thereof published as provided in section 2688 of the Political Code, a hearing of the petition was had, followed by an order wherein, after reciting that evidence both oral and documentary was received touching all matters set forth in said petition, the board expressly found said petition to be true, and that "all said petitioners are freeholders in said Vinedale road district and taxable therein for road purposes; that they will be accommodated by the proposed vacation, and that at least two of said petitioners are residents in said road district"; and thereupon said board ordered that the petition be

granted and that the highway, which was in said petition and said order described, be vacated and abandoned and the land contained therein restored to acreage. Thereafter, on August 5, 1912, the board of supervisors, by a purported order made and entered, rescinded the order made July 7, 1909, hereinbefore referred to, whereby said road was vacated and abandoned.

In its answer defendant alleges that four of the ten persons whose signatures were attached to the petition for the vacation and abandonment of said highway were not freeholders; hence it is claimed the petition was insufficient to vest jurisdiction in the board of supervisors to make the order vacating said roadway; or, to use the language of counsel for defendant, "the county of Los Angeles maintains that inasmuch as the petition was not signed by ten freeholders, as required by section 2681 of the Political Code, the board of supervisors did not obtain jurisdiction, and that this order declaring the road vacated was without jurisdiction and void." In support of this allegation contained in the complaint and in accordance with counsel's contention, the court, over plaintiff's objection, received evidence tending to show that some of the signers of the petition were not freeholders and would not in fact be accommodated by the closing of the road. That a board of supervisors may, of its own motion and without any petition therefor, order a public road abandoned, was held by this court in *Swift v. Board of Supervisors*, 16 Cal. App. 72, [116 Pac. 317], where it was said, "that by subdivision 3 of section 2643 of the Political Code it is made the duty of the board, of its own motion and without hearing evidence, to abandon by proper order such roads as are not necessary for the public use, and thus relieve the county of the expense and burden of their maintenance." Conceding, however, that this statement was, as claimed by respondent, unnecessary in the decision of that case and that the presentation of a petition signed by at least ten freeholders, two of whom shall be residents of the road district wherein the road proposed to be vacated is situated and taxable therein for road purposes, all as provided in section 2681 of the Political Code, is a necessary prerequisite to the making of such an order, nevertheless the question as to the genuineness of the signatures and the qualifications of the signers of the petition is one to be determined by the board



(*Great Western Power Co. v. Pillsbury*, 170 Cal. 180, [149 Pac. 35]), and as to which question the order in this case recites that evidence was heard and upon which the board found such facts to be established. As to this question the board acted judicially. (*Waugh v. Chauncey*, 13 Cal. 11.) We must assume that at the hearing regularly had upon a petition sufficient both in form and substance the evidence was ample to establish the truth of the facts so found; hence it follows that such adjudication "can be vacated only in the manner and upon the grounds that would justify the vacation of a judgment rendered by a court of record, and mere error in the adjudication of a question of fact, not procured by fraud extrinsic or collateral to such question, is not ground upon which it may be vacated, since, if it were, no adjudication of a question of fact would ever become final, so long as new evidence could be had, or a different conclusion be reached upon the same (or, as in this case, other) evidence." (*People v. Los Angeles*, 133 Cal. 338, [65 Pac. 749].) To permit a collateral attack in such cases as permitted herein by the trial court must inevitably lead to intolerable confusion. The abandonment of the road was not a proceeding which directly affected private property, and hence is distinguishable from those cases in proceedings to open, grade, or improve a street, as was that of *Wilcox v. Engebretsen*, 160 Cal. 288, [116 Pac. 750].

That the action of the board of supervisors in making the order vacating the road in question is not open to collateral attack is sustained by numerous decisions, among which see *Swift v. Board of Supervisors*, *supra*; *Levee District v. Farmer*, 101 Cal. 178, [23 L. R. A. 388, 35 Pac. 569]; *Belser v. Hoffschneider*, 104 Cal. 455, [38 Pac. 312]; *County of Sis-kiyou v. Gamlich*, 110 Cal. 94, [42 Pac. 468].

The order is reversed.

Conrey, P. J., and James, J., concurred.

[Crim. No. 607. Second Appellate District.—July 29, 1918.]

THE PEOPLE, Respondent, v. LOUIE DELGADO,  
Appellant.

**CRIMINAL LAW—COMMISSION OF LEWD ACTS—IDENTITY OF DEFENDANT—SUFFICIENCY OF EVIDENCE.**—In this prosecution for lascivious conduct with an eight year old girl in violation of section 288 of the Penal Code, it is held the evidence is sufficient to warrant the conclusion that the defendant was the perpetrator.

**ID.—PLACING OF HAND ON PRIVATE ORGANS—GIRL NOT AN ACCOMPLICE.** In a prosecution for the commission of lewd acts, where the defendant was charged with placing the hand of a girl of the age of eight years upon his private organs, the girl was not, in view of the amendment of 1915 to section 1111 of the Penal Code, an accomplice, being, if anything, a mere passive instrument.

**ID.—EVIDENCE—SUBSEQUENT ACTS.**—In such a prosecution, evidence of what occurred two weeks subsequent to the date charged, when the defendant was trapped and arrested, is admissible.

**ID.—EXPERT TESTIMONY—EFFECT OF PLACING HAND UPON PRIVATE ORGANS—HARMLESS ERROR.**—In such a prosecution the admission of expert testimony to prove that the placing of a girl's hand upon a man's private organs would tend to excite his passion and to a certain extent gratify his desires is error without prejudice where the jury under the evidence could not well have concluded that the acts charged were other than those denounced by the statute.

**ID.—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—LACK OF DILIGENCE.** In such a prosecution it is not error to deny a motion for a new trial on the ground of newly discovered evidence, where the evidence was such as could have been procured with reasonable diligence at the trial.

**APPEAL** from a judgment of the Superior Court of Kings County, and from an order denying a new trial. M. L. Short, Judge.

The facts are stated in the opinion of the court.

J. C. C. Russell, for Appellant.

U. S. Webb, Attorney-General, Joseph L. Lewinsohn, Deputy Attorney-General, and Jerry H. Powell, for Respondent.

**JAMES, J.**—Defendant, after conviction of the crime described in section 288 of the Penal Code, appeals from a judg-

ment of imprisonment and an order denying his motion for a new trial.

The evidence offered on behalf of the prosecution was as to its most material part furnished by a little girl eight years of age. She testified that on the seventeenth day of February, 1918, she entered a picture theater in the city of Hanford and took a seat well toward the front of the room; that in the seat next to her was the defendant, a young Mexican, whom she had never seen before to her knowledge; that defendant offered her five cents and told her to get some popcorn, but that she did not do this; that defendant offered her ten cents, but did not present it to her; that he gave her another ten-cent piece and took that away, then "half a dollar or a dollar" and took that away; that when he proffered her the first ten cents he said, "if you will give me a kiss"; that thereafter he moved over toward her, placed his hand under her dress and placed one of her hands in his lap under his hat and upon his private organs. The little girl further testified that she took her hand away "about a minute after," and that upon going out of the theater she told her mother, who in turn told the father. The evidence was further that on a Sunday, two weeks later, she went to the theater with her mother and father, the latter being determined to trap the man if he should again approach the child. The mother and father took seats toward the rear of the room and the child went to the front and sat down. Soon the same man came and sat beside her and began to talk to her; whereupon an officer was called, who placed him under arrest. Throughout the early part of her testimony the little girl had referred in positive terms to the defendant as being the man who had committed the lewd act on the seventeenth day of February. Toward the conclusion of her testimony she was asked by the district attorney whether she was sure that the defendant was the same man who molested her on the 17th of February, and the following dialogue thereupon occurred: "A. I am almost sure, because he offered me money. Q. Are you not positive? A. I am almost sure. Q. You are almost sure? A. Yes, sir. Q. Are you sure that it is the same man that came in the second time when they arrested him? A. I am almost sure. Q. Well, are you just as sure it was the same man they arrested on the second Sunday as you are that it was the same man you saw there on the 17th?

A. I am almost sure. Q. Well, I want to find out how sure you are, Birdie. You say you are almost sure it was the same man both times; now are you just as sure that it was the same man the first time as you are that it was the same man the second time? A. Yes." The latter answers given by the child form the basis for the argument made by appellant that the evidence was insufficient to warrant the conviction in that there was no sufficient proof of the identity of the defendant. The cross-examination of the child developed no greater uncertainty as to the matter of her identification of the defendant than that appearing from the testimony quoted. We think that there was enough presented to the jury to warrant it in concluding that the defendant was the person who committed the lewd acts on the day charged; that is, there is no such want of evidence as to authorize this court to say that the verdict in that particular is unsupported.

The appellant further contends that if any criminal act was committed, the child was an accomplice to it, and that her testimony should have been corroborated. It does not appear that the child was an active participant in the unlawful performance, but rather that she was, if anything, a mere passive instrument in the hands of the defendant. She was, therefore, not an accomplice. (*People v. Camp*, 26 Cal. App. 385, [147 Pac. 95].) Furthermore, as the attorney-general properly suggests, she could not have been an accomplice under the definition given in Penal Code, section 1111, as amended in 1915. The amendment referred to is as follows: "An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (See, also, *People v. Beggs*, 178 Cal. 79, [172 Pac. 152].) The decisions cited by appellant, which refer to the state of the law as it existed prior to the date of the amendment, are plainly not in point. The evidence of what occurred on the Sunday subsequent to the 17th of February and at the time when defendant's arrest occurred was admissible under the rule now well settled. There are a number of decisions which give expression to that rule, only one of which need be cited: *People v. Mathews*, 139 Cal. 527, [73 Pac. 416].

Appellant claims that it was prejudicial error for the court to permit a physician to testify in answer to a hypothetical question embodying the circumstances of the offense and to give his opinion that the acts complained of would "tend to excite the passions and gratify to a certain extent the desires of the individual perpetrating such acts." The matter was probably not one calling for the expression of expert opinion, but conceding error in admitting this testimony, we cannot see that any prejudice could result therefrom. Defendant denied *in toto* the commission of any such acts. The acts themselves, as described by the child (we have not attempted to relate all of the details in the foregoing), were in their very nature of the kind denounced by the statute; and under the evidence, the jury could not well have concluded that they were other than of that variety.

The court instructed the jury fully and fairly, and we think no error is shown in the refusal to give certain instructions offered by the defendant and in modifying others. The errors claimed as affecting the instructions, in our opinion, do not warrant any particular discussion. It may be noted that the court was careful to advise the jury that the testimony of a child of tender years ought to be viewed with great care and caution and without bias and prejudice; further stating that the charge made against the defendant was one "easy to make, but hard to disprove."

Appellant urged before the trial court that he was entitled to a new trial because of alleged newly discovered evidence. This evidence, as shown by several affidavits used on hearing of the motion, consisted in the statements of persons who deposed that they had seen the appellant on the day and during the time that the alleged crime was committed a considerable distance away from the town of Hanford; one of these deponents at least had talked with the appellant, who, he deposed, was driving a horse and wagon on a journey for firewood. The nature of this so-called newly discovered evidence was such as must have been within the reach of defendant at all times during his trial; his counsel, by the very nature of the defense which he presented, was put upon inquiry as to the same facts. Defendant at the trial testified that he was not in the picture show house on the 17th of February, but that he was at work on a ranch. This contention of his would at once suggest the finding of other evidence in

the nature of *alibi* proof and would ordinarily lead to an inquiry by his counsel as to what persons the defendant had been with, seen, or talked to at the important time. It cannot be said, we think, that the evidence claimed to have been newly discovered was such as could not have been procured with reasonable diligence at the trial. No abuse of discretion is, therefore, shown in denial of the motion.

The judgment and order are affirmed.

Conrey, P. J., and Shaw, J., concurred.

---

[Crim. No. 605. Second Appellate District.—July 29, 1918.]

THE PEOPLE, Respondent, v. GEORGE A. TINNEY et al.,  
Appellants.

**INTOXICATING LIQUORS—PURCHASE BY CLUB—SALE TO MEMBERS—VIOLATION OF WYLLIE ACT.**—Under section 14 of the Wyllie local option law, prohibiting the keeping of a place within no-license territory where alcoholic liquor is sold, served, or distributed, a club and its chairman of house committee and steward, as its agents, are guilty of a violation of the act, where the members of the club, which was located in no-license territory, desiring liquor, notified the steward, who ordered it from a wholesale liquor house, and the liquor was shipped to and charged to the club, and upon its arrival distributed among the members and payment therefor collected by the club, the liquor being kept either in a locker used in common, or placed indiscriminately with that of others in a refrigerator until served by the steward.

**APPEAL** from a judgment of the Superior Court of Imperial County. Z. B. West, Judge.

The facts are stated in the opinion of the court.

Ault & Chase, and Dan V. Noland, for Appellants.

U. S. Webb, Attorney-General, Joseph L. Lewinsohn, Deputy Attorney-General, and Jerry H. Powell, for Respondent.

**SHAW, J.**—Defendants, alleged to be acting as agents of the Loyal Order of Moose in the city of Calexico, were con-

victed of the violation of section 14 of what is known as the "Wyllie Local Option Act," which provides that "it shall be unlawful for any person, corporation, firm, company, association or club, within any no-license territory to keep, conduct or establish, as principal or agent, any place where alcoholic liquors are sold, served or distributed, or are kept for the purpose of sale or distribution, except as provided in section 16 hereof, . . . " It appears without contradiction from the evidence that in the city of Calexico, which was "no-license territory," there existed a lodge of a fraternal order known as Loyal Order of Moose No. 1623 which, for the use of its members, maintained in the rooms of a building separate from the meeting place of the lodge certain clubrooms, which were in the immediate charge of what was known as a house committee of which Tinney, the dictator of the lodge, was chairman, and wherein McCombs was employed as custodian or steward. In the rear of one of the rooms there was kept a long counter or bar, back of which was another bar upon which, on the night defendants were arrested, were numerous open bottles of liquor of various kinds, and hanging from the bar a government liquor license issued to the lodge. In the rooms at the time were found some seven barrels of whisky, wine, and beer. The evidence further conclusively shows that it was the practice for members desiring liquor to notify McCombs, who would order the same from some wholesale liquor house, which shipped it to the lodge, making a charge therefor, not against the member for whom it is claimed it was purchased, but against the lodge, which paid the seller therefor. Having thus purchased the liquor it was, upon delivery to the lodge at these clubrooms, distributed and served to the members, according to the kind and quantity ordered, and from whom payment therefor was collected by the lodge in accordance with statements rendered therefor. As desired, the beverage so acquired by a member, and which he kept either in a locker used in common with other members, or placed indiscriminately with that of others in a refrigerator for cooling, was served to him by McCombs, who, as custodian of the rooms, was paid a salary for his services by the lodge.

The contention of defendants is that such liquors as those served did not belong to the lodge, nor to defendants or either of them, but that they were purchased and owned by the members of the lodge, who kept lockers and receptacles wherein

the same were placed for the individual use of members who had purchased the same, and since, as held in *People v. Winkler*, 174 Cal. 133, [162 Pac. 109], the statute does not prohibit one in dry territory from purchasing intoxicating liquors outside of such territory and bringing them within such no-license territory for his own consumption, it was likewise permissible for the individual members of the lodge to employ the lodge or defendants as their agents to make such purchase and deliver, serve, and distribute the liquors to them at the clubrooms. So claiming, they contend that the court erred in refusing to instruct the jury to the effect that they should acquit defendants if they found that in the purchase and delivery of such liquors they acted as agents of the owners thereof who used it on the premises. The prosecution in the *Winkler* case was under section 13 of the act, which makes it unlawful to sell, furnish, distribute, or give away, within the boundaries of no-license territory, any alcoholic liquors, except in certain cases. The prosecution here had was under section 14 of the act, which makes it an offense to keep, conduct, or establish a place where alcoholic liquors are sold, served, or distributed, except as provided for in section 16 of the act, under which one is permitted to serve liquors at his own home to members of his family or to guests as an act of hospitality. No claim, however, is made that these clubrooms constituted the home of the members of the lodge. Moreover, in the *Winkler* case, wherein it was held that an agent was not guilty of a violation of the law in acting as the agent of another in the purchase of alcoholic liquors in license territory and bringing them within no-license territory, the transaction was had with the principal himself, who was the purchaser of the beverage in no-license territory. Not so, however, in this case, since it appears that the transaction, wherein the liquors were acquired outside of the city of Calexico, was one had between the seller and the lodge, which made the purchase and thereafter sold the liquors to members of the lodge, in kind and quantity as ordered. The fact that such sales were by the bottle or barrel makes it none the less an offense than if it had been sold by the drink. There was no privity of contract between the member acquiring liquor and the wholesale house in license territory which sold it to the lodge. Such house did not look to the member for payment, and there was no privity of contract between the two. The members looked to the lodge



in supplying them with liquor, and the lodge having received orders therefor, purchased such liquor from outside territory and *sold, distributed, and served* it to the members, thus bringing itself and defendants as its agents within the terms of section 14 of the statute which prohibits such business. Clearly, this clubroom was a place established and conducted by defendants as agents of the lodge for the sale, distribution, and service of alcoholic liquors. The entire scheme was a subterfuge calculated to evade the plain provisions of the law, and for this court to give countenance to the practice concededly carried on would nullify the law, both in letter and spirit.

The judgment is affirmed.

Conrey, P. J., and James, J., concurred.

---

## MEMORANDUM CASES.

---

[Civ. No. 1845. Third Appellate District.—April 22, 1918.]

SARAH A. LILLIE et al., Appellants, v. CLARK & HENERY CONSTRUCTION COMPANY (a Corporation), Respondent.

STREET LAW—ELECTION OF PROPERTY OWNERS TO DO WORK—CONSTRUCTION OF IMPROVEMENT ACT OF 1911.—Judgment affirmed upon the authority of *Wentland et al. v. Clark & Henery Construction Co., ante*, p. 34.

APPEAL from a judgment of the Superior Court of San Joaquin County. J. A. Plummer, Judge.

The questions presented in this case are identical with those considered in *Wentland et al. v. Clark & Henery Construction Co., ante*, p. 34, [173 Pac. 480].

Walter R. Dunn, for Appellants.

White, Miller, Needham & Harber, for Respondent.

THE COURT.—The questions presented in this case are identical with those considered in *Wentland et al. v. Clark & Henery Construction Co., ante*, p. 34, [173 Pac. 480].

Upon the authority of that case, the judgment in the present case is affirmed.

---

[Civ. No. 2535. Second Appellate District.—May 28, 1918.]

CHARLES A. CHASE, Respondent, v. HOMER II. PETERS, Jr., et al., Appellants.

UNLAWFUL DETAINER—RECOVERY OF TAXES AND RENTS—MISJOINDER OF CAUSES OF ACTION.—Judgment reversed and trial court directed to enter judgment for appellant on the authority of *Chase v. Peters et al., ante*, p. 358.

APPEAL from a judgment of the Superior Court of San Diego County. W. A. Sloane, Judge.

The facts are similar to those stated in *Chase v. Peters et al.*, *ante*, p. 358, [174 Pac. 116].

Joe Crider, Jr., and Doolittle & Morrison, for Appellants.

James E. Wadham, and Glen H. Munkelt, for Respondent.

JAMES, J.—This is an appeal taken from a judgment entered in favor of the plaintiff, the action being one to recover possession of real property because of its alleged unlawful detention. The facts in the case are in the main set out in the opinion filed this day wherein the appeal of Homer H. Peters, Jr., and Peters Investment Company, codefendants with this appellant, is considered, that appeal being numbered Civil 2530, *ante*, p. 358, [174 Pac. 116].

The additional facts pertinent to be stated here are, that contemporaneously with the making of the lease, this appellant gave a bond or undertaking guaranteeing the faithful performance of the terms and conditions of the lease contract. In this unlawful detainer suit, by a second count in his complaint, the plaintiff showed the facts relative to the giving of the undertaking and the breach on the part of the persons holding under the lease to pay rental and to pay the taxes assessed against the real property. It was alleged that the plaintiff had been required to pay the taxes, and recovery was sought against this appellant for amounts of money so paid; also for rents which had accrued against the lessee. The contention of appellant is that the joining of the cause of action against it with a cause of action for the unlawful detention of the property, against the persons in possession, was improper. We have given full consideration to the point made in the opinion filed in case No. 2530. We refer to that opinion as expressing our conclusions in the matter of this appeal.

The judgment as against the appellant surety company is reversed and the trial judge is directed, upon the findings of fact as made, to enter judgment for said appellant.

Conrey, P. J., and Works, J., *pro tem.*, concurred.

[Civ. No. 1854. Third Appellate District.—June 5, 1918.]

W. M. DOTY, Respondent, v. W. J. MATSON et al., as  
Trustees, etc., Appellants.

VENDOR'S LIEN—PAYMENT IN CORPORATE STOCK.—Judgment reversed  
on the authority of *Doty v. California Rice Milling Co. et al.*, ante,  
p. 449.

APPEAL from a judgment of the Superior Court of Butte  
County. H. D. Gregory, Judge.

The facts are identical with those in the case of *Doty v. California Rice Milling Co. et al.*, ante, p. 449, [174 Pac. 389].

Norman A. Eisner, Cushing & Cushing, and George F. Jones, for Appellants.

W. H. Carlin, for Respondent.

CHIPMAN, P. J.—This is an appeal by defendants Matson, Braun and Hale from the judgment made and entered in the cause entitled *W. M. Doty v. California Rice Milling Co. et al.*, ante, p. 449, [174 Pac. 389], which latter case was this day decided and the judgment therein reversed. Referring to that case, respondent says in his brief: "If our vendor's lien is sustained we satisfy it out of the property and that alone. If it is not sustained we get nothing." In considering the case No. 1840 we were constrained to hold that the plaintiff's alleged vendor's lien was not sustained and that plaintiff was not entitled to the relief prayed for.

We see no reason for appellants taking this separate appeal upon a separate record.

The judgment is reversed, each party to pay his own costs of the appeal.

Hart, J., and Burnett, J., concurred.

87 Cal. App.—52

[Civ. No. 1856. Third Appellate District.—June 27, 1918.]

HENRY KROHN et al., Appellants, v. RECLAMATION DISTRICT No. 17 et al., Respondents.

RECLAMATION DISTRICT—PAYMENTS UNDER VOID ASSESSMENT—RIGHT TO CREDIT—MANDAMUS.—Judgment affirmed on the authority of *Spurrier et al. v. Neumiller, etc., ante*, p. 683.

APPEAL from a judgment of the Superior Court of San Joaquin County. John Hancock, Judge Presiding.

The facts are similar to those stated in *Spurrier et al. v. Neumiller, etc., ante*, p. 683, [174 Pac. 338].

D. V. Marceau, John A. Wilson, and S. M. Spurrier, for Appellants.

George F. Buck, and Clary & Louttit, for Respondents.

BURNETT, J.—This action was brought to prevent the sale of the property of plaintiffs to enforce the lien of a reclamation tax and is a companion case to *Spurrier v. Neumiller, etc., ante*, p. 683, [174 Pac. 338]. It is conceded that the decisive question is the same in the two appeals, and that is, whether the land should be credited with the payment of said invalid assessment. Having reached the conclusion that the lower court was correct in holding that no such credit should be given, it follows that we should affirm the judgment in this case, and it is so ordered.

Chipman, P. J., and Hart, J., concurred.

A petition to have the cause heard in the supreme court, after judgment in the district court of appeal, was denied by the supreme court on August 26, 1918.

# INDEX.

(819)



# INDEX.

---

**ABANDONMENT.** See Highways, 1-4.

**ACCESSORIES.** See Criminal Law, 1, 16, 17.

**ACCIDENT INSURANCE.**

**INDEMNITY AGAINST LIABILITY FOR BODILY INJURIES — NEGLIGENCE OF EMPLOYEE OF INDEPENDENT CONTRACTOR—ACCIDENT NOT COVERED.—**

A policy of insurance against liability imposed by law upon the owner of a building and the party under whose supervision the work was done and who let the contract and did the carpenter and mason work, and resulting from the negligence of any contractor or subcontractor engaged in such work, does not cover an accident to person passing along the street sustained by the negligence of an employee of an independent contractor. (*Wilson v. London Guarantee etc. Co.*, 245.)

**ACCOMPLICE.** See Criminal Law, 45.

**ACCOUNTS.**

**OPEN ACCOUNT—ALLOWANCE OF INTEREST.—**In an action for the reasonable value of goods on an open account, interest is allowable only from the date upon which the balance is ascertained. (*Sea v. Lorden*, 444.)

See Trusts, 1, 2.

**ADVERSE POSSESSION.**

**CONVEYANCE OF TITLE—SUBSEQUENT DEED FROM REMOTE OWNERS—INTEREST NOT ACQUIRED.—**One who acquires title to real property by adverse possession and payment of taxes and then conveys it to another acquires no interest in the property under a later deed from the owners previous to his adverse possession, nor do his subsequent grantees acquire any interest. (*Bond v. Aichley*, 11.)

**AFFIDAVITS.** See Judgments, 16, 18-20; Street Law, 26, 27.

**AGENCY.** See Brokers, 2, 3; Contracts, 29; Sales, 7.

**ALIMONY.** See Divorce, 1, 2.

**ANNEXATION.** See Municipal Corporations, 1.

(821)



## APPEAL.

1. **JUSTICE'S COURT APPEAL—JUSTIFICATION OF SURETIES ON UNDERTAKING—WAIVER.**—Where an undertaking on appeal from a justice's court was filed which was on its face in due form and duly executed and notice thereof served, and plaintiff demanded that the sureties justify, but before day of justification stipulated that defendant might justify at a time unauthorized by section 978a of the Code of Civil Procedure, the superior court should have treated the stipulation as a waiver of justification and have entertained the appeal on the assumption that a sufficient undertaking had been filed. (*Fish v. Superior Court*, 95.)
2. **REVIEW OF ACTION OF SUPERIOR COURT—MANDAMUS.**—*Mandamus* is available as one of the means of determining whether the superior court was justified in dismissing an appeal from a justice's court for failure of the sureties on the undertaking to justify as provided by section 978a of the Code of Civil Procedure. (*Id.*)
3. **JUDGMENT—PAYMENT—MOOT QUESTIONS—DISMISSAL.**—Where pending an appeal from a judgment directing the payment of money it is made to appear to the appellate court that the judgment has been paid in full, the questions presented upon the appeal become moot, and the appeal will be dismissed. (*Hurt v. Bauer*, 109.)
4. **JUDGMENT—ORDERS DENYING NONSUIT AND DIRECTED VERDICT—CHANGE OF STATUTE—REVIEW.**—On an appeal from a judgment taken more than sixty days after its entry, the action of the court in denying motions for nonsuit and directed verdict are reviewable, where the case is one where the statute abolishing appeal from orders denying a new trial went into effect while motion for new trial was pending and undecided. (*Linn v. Piersol*, 171.)
5. **UNDERTAKING ON APPEAL—TIME FOR FILING.**—Where notice of appeal is filed before the expiration of the statutory period, an undertaking filed within five days thereafter is within time, although the undertaking was filed more than six months after the judgment. (*Id.*)
6. **ALTERNATIVE METHOD—RECORD.**—On an appeal from a judgment under the alternative method, the appellate courts are not required to examine the typewritten transcript, but the parties must print in their briefs the portion of the record to which they desire to call the court's attention. (*Nave v. Graham*, 332.)
7. **ALTERNATIVE METHOD—PRESUMPTION AS TO RECORD.**—Where the record on appeal from a judgment is prepared under the alternative method, without a printed transcript, the law presumes, without examining the typewritten transcript, the court will rely solely upon those portions of the record which the parties print in their briefs. (*Moore v. Guajardo*, 342.)
8. **INSUFFICIENCY OF EVIDENCE TO SUPPORT FINDINGS—DEFECTIVE RECORD—MATTER NOT REVIEWABLE.**—On an appeal from a judgment

## APPEAL (Continued).

taken under the alternative method, the insufficiency of the evidence to sustain the findings cannot be considered where there is not printed with the appellant's brief a copy of the notice of appeal or any part of the judgment-roll, and the brief contains only extracts of the evidence. (Id.)

9. **QUESTION OF FACT.**—Appellate courts are not permitted to disturb a judgment where the determination of the facts is the issue presented, except where the evidence to the point is all one way, when the question becomes one of law as to what judgment is indicated therefrom. (*Vandelinder v. Roberts*, 404.)
10. **COSTS—DENIAL OF MOTION TO STRIKE OUT—RECORD—ORDER NOT REVIEWABLE.**—Alleged error in denying a motion to strike out a bill of costs is not properly presented where the appellant fails to print in his brief any part of the record containing the order or showing the motion or the grounds thereof. (*Wheeler v. Houston, Gore & Loy*, 407.)
11. **CLAIM AND DELIVERY—VALUE OF SECURITIES—FINDING.**—In an action in claim and delivery for the recovery of certain securities, the appellate court is concluded by the finding that the value of the securities is as alleged, no segregation of the different securities being made, and the appellant cannot take advantage of clerical error in the recital of the value of a portion thereof. (*Grange v. American Nat. Bank*, 432.)
12. **ALTERNATIVE METHOD—PRINTING OF RECORD IN BRIEF.**—On an appeal taken under the alternative method, the parties must print in their briefs such portions of the record as they desire to call to the attention of the court. (*Sea v. Lorden*, 444.)
13. **TYPEWRITTEN TRANSCRIPTS NOT REVIEWABLE.**—Appellate courts will not look to the typewritten transcripts filed under the alternative method of appeal for the purpose of determining whether grounds exist for the reversal of the judgment appealed from. (Id.)
14. **ALTERNATIVE METHOD—RECORD—PRINTING IN OPENING BRIEF.**—Where an appeal is taken under the alternative method, it is the duty of the appellant to print in his opening brief such portion of the record as he desires to call to the attention of the appellate court, and it is not proper procedure to omit to do so and discuss the evidence in the reply brief. (*Wong Ah Sure v. Ty Fook*, 465.)
15. **FAILURE TO OBJECT TO TESTIMONY.**—In such an action, where no objection was raised to the admission of such testimony, the defendants cannot be heard to complain on appeal. (*J. & H. Goodwin, Ltd., v. Franich*, 493.)
16. **ALTERNATIVE METHOD—TYPEWRITTEN TRANSCRIPTS NOT REVIEWABLE.**—Appellate courts will not look to the typewritten transcripts filed under the alternative method of appeal, to determine whether

## APPEAL (Continued).

- ground exists for the reversal of the judgment appealed from. (Greer-Robbins Co. v. Pacific Surety Co., 540.)
17. **JUDGMENT-ROLL—PRESUMPTION.**—On an appeal on the judgment-roll alone, every intendment possible is in favor of the judgment or order appealed from, and if error does not affirmatively appear, the judgment or order will be sustained, if there is any possible ground. (Meyers v. Canepa, 556.)
  18. **IMPROPER JOINDER OF CAUSES OF ACTION—TRIAL UPON COMPLAINT—WAIVER OF DEFECT—PRESUMPTION.**—On an appeal taken for failure to sustain a demurrer to a complaint which improperly united causes of action, but in itself stated a good cause of action in so far as the plaintiff himself was concerned, a judgment in favor of plaintiff will be affirmed, since it will be presumed that the defect was cured at the trial. (Id.)
  19. **DEFAULT JUDGMENT—MISJOINDER OF CAUSES OF ACTION.**—Upon an appeal upon the judgment-roll from a default judgment, the appellate court will not consider the question of misjoinder of causes of action in the manner it would if a demurrer had been filed in the case upon that ground. (Zucco v. Farullo, 562.)
  20. **UNLAWFUL DETAINER—DEFAULT JUDGMENT—MISJOINDER OF OTHER CAUSES OF ACTION—INSUFFICIENT GROUND FOR REVERSAL OF JUDGMENT.**—Upon an appeal from a default judgment in an action in unlawful detainer, the court will not reverse the judgment because of an attempt to unite other causes of action with that of unlawful detainer, where the complaint states a cause of action in unlawful detainer. (Id.)
  21. **DEFAULT IN FILING BRIEF—MISTAKE AS TO APPELLATE COURT—RELIEF.**—The district court of appeal will grant a motion for relief from default in filing an opening brief on appeal, where the motion is made under the provisions of section 473 of the Code of Civil Procedure upon the ground of mistake, inadvertence, and excusable neglect arising from the fact that in good faith appellant believed that the action was one in equity and the appeal was properly taken by him to the supreme court. (Paramore v. Colby, 648.)
  22. **JUSTICE'S COURT OF APPEAL—PAYMENT OF FEES—TIME.**—On an appeal from a justice's court, it is not necessary that the fees provided by section 981 of the Code of Civil Procedure to be paid to the county clerk for filing the transcript on appeal and placing the action on the calendar in the superior court should be paid to the justice at the time of the filing of notice of appeal, and where paid within the thirty-day period allowed for taking the appeal, the statute has been sufficiently complied with, and jurisdiction of the appeal acquired. (Simmons v. Superior Court, 676.)
  23. **RIGHT TO SUE WIFE ALONE—PRESUMPTION NOT ENTERTAINABLE.**—  
Upon an appeal from a judgment upon the judgment-roll in an

**APPEAL (Continued).**

action against a wife, it cannot be presumed that the case falls within one of the exceptions enumerated in subdivisions 2 and 3 of section 370 of the Code of Civil Procedure, in which a wife may be sued alone, where the complaint alleges that the husband is joined because he is the husband of his codefendant. (*Fassio v. Woolfrey*, 754.)

**24. ALTERNATIVE METHOD—PRINTING OF RECORD IN BRIEFS.**—Where the record on appeal has been prepared in typewritten form under the alternative method provided by sections 953a et seq. of the Code of Civil Procedure, the parties must print in their briefs, or in a supplement appended thereto, such portions of the record as they desire to call to the attention of the court. (*Dutwiler v. Klunk*, 796.)

**25. ORDER DENYING MOTION TO STRIKE OUT STAY BOND—DISPOSITION OF MAIN APPEAL—MOOT QUESTION.**—An appeal from an order denying a motion to strike out an undertaking on appeal staying execution and to vacate the stay will be dismissed, as involving questions of only abstract interest, where the appeal from the judgment in the main case has been determined, and the action of the appellate court thereon has become final. (*Bekins v. Smith*, 802.)

**26. JUDGMENT—ALTERNATIVE METHOD—PRINTING OF RECORD IN BRIEFS.** On an appeal taken from a judgment, where the record is prepared under the alternative method, the parties must, under section 953c of the Code of Civil Procedure, print in their briefs such portions of the record as they desire to call to the attention of the appellate court, and where they fail to do so, the reviewing court will not look into the typewritten transcript to ascertain whether the points urged as ground for reversal are well made. (*Pitt v. Pensinger*, 199.)

See Condemnation of Land, 7; Corporations, 4; Criminal Law, 4, 12, 20, 27, 34, 36; Divorce, 2; Insurance, 2; Judgments, 1; Leases, 9-12; Negligence, 3, 12; 27, 31; New Trial, 1-3; Superseas, 2; Trusts, 9.

**APPEARANCE.** See Contempt, 3.

**ARCHITECTURE.****ACTION FOR ARCHITECT'S SERVICES—VERDICT SUPPORTED BY EVIDENCE.**—

In this action for architect's services, it is held that the verdict was amply warranted by the evidence, and that there was no error in the refusal of certain instructions and the modification of others. (*Scholz v. Gartland*, 284.)

**ARGUMENT.** See Criminal Law, 18, 38.

**ASSESSMENTS.** See Corporations, 3.

**ASSIGNMENTS.** See Leases, 9; Unlawful Detainer, 6.

**ATTACHMENT.**

1. **ACTION ON BOND—PREVIOUS SATISFACTION OF JUDGMENT FOR COSTS—TIME OF COMMENCEMENT OF ACTION.**—An action will lie on an undertaking given on the issuance of a writ of attachment when the judgment in favor of the defendant for costs has been satisfied, notwithstanding the time for appeal from the judgment has not expired. (*Morneault v. National Surety Co.*, 285.)
2. **ATTACHMENT OF AUTOMOBILE—MEASURE OF DAMAGES.**—In such an action, the attached property being an automobile and kept by the plaintiff, for sale only, the plaintiff is only entitled to damages for depreciation in value for the time it was held under attachment, and is not entitled to any compensation for being deprived of its use, since the damages depended upon the use to which the owner of the property would put the same had his possession of it been undisturbed. (*Id.*)
3. **DISSOLUTION BY NONSUIT—DUTY OF SHERIFF.**—An attachment is *ipso facto* dissolved where an order of nonsuit is granted and entered in the minutes of the court and no appeal perfected therefrom within the statutory time, and it is the duty of the sheriff to release the attachment of record. (*Clark v. Superior Court*, 732.)
4. **SETTING ASIDE OF ORDER OF NONSUIT—ATTACHMENT LIEN NOT REVIVED.**—An order setting aside an order granting a nonsuit cannot, in the absence of statutory provision therefor, revive the lien of an attachment which had been dissolved by the order of nonsuit. (*Id.*)

See Claim and Delivery, 2; Pleading, 3.

**ATTORNEY AND CLIENT.**

**COLLECTION OF MONEY—RIGHT OF RETENTION PENDING DETERMINATION OF COMPENSATION—EVIDENCE—ACTION FOR CONVERSION.**—An action for conversion cannot be maintained against attorneys at law for a sum of money collected by them for a client where, under the facts of the case, the attorneys had the right to retain the possession of the money until it was legally ascertained that a reasonable compensation for their services amounted to a less sum than that collected. (*Pullin v. Allen*, 218.)

See Contempt, 8; Contracts, 16; Evidence, 4; Judgments, 20.

**ATTORNEY AT LAW.**

1. **SUSPENSION FROM PRACTICE—RECORD OF FOREIGN COURT—PROCEDURE.**—An attorney at law can be removed or suspended upon the record of a foreign court convicting him of a crime involving moral turpitude, without notice and without giving him an opportunity to be heard or to answer to the sufficiency of the record or to deny the allegations therein contained. (*In re Thompson*, 344.)

**ATTORNEY AT LAW (Continued).**

2. **CRIMES DENOUNCED BY REVISED STATUTES OF UNITED STATES—WHEN CAUSE FOR DISBARMENT.**—The crimes denounced by section 5470 of the Revised Statutes of the United States are within the terms of section 287 of the Code of Civil Procedure whenever they involve moral turpitude. (Id.)
3. **CONCEALMENT OF STOLEN CURRENCY—CRIME INVOLVING MORAL TURPITUDE.**—The crime of receiving stolen currency from one who has stolen it from the mails, and to conceal and aid in the concealment of it, is a crime involving moral turpitude. (Id.)
4. **APPLICATION FOR REINSTATEMENT TO PRACTICE — INSUFFICIENCY OF EVIDENCE.**—An application by an attorney at law for reinstatement to practice upon the ground of reformation of character cannot be considered where the letters asking for such reinstatement are from attorneys residing out of the state and their signatures are not verified. (Id.)

**ATTORNEYS' FEES.** See Building Contracts, 1, 2.

**BAIL.** See Criminal Law, 25.

**BANKS AND BANKING.**

1. **PAYMENT OF FOREIGN CHECKS—NEGLIGENCE OF DEPOSITOR.**—A bank is not liable to a depositor for money paid out on forged checks of the cashier of the depositor extending over the period of almost one year where at the end of each month the forged checks, together with the valid checks which had been paid during the month, were returned to the depositor with a statement of account, accompanied with a written request to report discrepancies within fifteen days, and neither the depositor nor its manager ever made any examination of the returned checks and statements until after the cashier had absconded. (California Veg. Union v. Crocker Nat. Bank, 743.)
2. **ACTION BY DEPOSITOR — STATUTE OF LIMITATIONS.**—The provision of the statute of limitations embodied in subdivision 3 of section 340 of the Code of Civil Procedure that an action against a bank by a depositor for the payment of a forged check must be brought within one year begins to run on presentment and payment of the check, and not upon discovery of forgery. (Id.)

See Trusts, 22-24.

**BONDS.**

1. **ACTION ON BOND — BUILDING CONTRACT — PAYMENT OF MONEY — PLEADING—SUFFICIENCY OF COMPLAINT—SUPPLEMENTAL COMPLAINT.** In an action on a building contractor's bond, if the complaint as originally filed was not sufficient, in that it failed to show at the date of the commencement of the suit the plaintiff had actually paid out the money, reimbursement of which was sought in the

**BONDS (Continued).**

action, it could not be helped out by supplemental complaint filed thereafter. (*Ceremony v. Drummond*, 446.)

2. **BREACH OF CONTRACT—SUFFICIENCY OF COMPLAINT.**—In such an action, an allegation that the contractor did not pay, as required by the bond, all claims for labor and material, and that certain enumerated claims were made for materials alleged to have been furnished to be used, and actually used, in the construction of the building, was sufficient to show a breach of contract. (*Id.*)
3. **ACTION ON BOND—ACTUAL PAYMENT OF CLAIMS UNNECESSARY.**—Under a bond guaranteeing payment by the contractor of all claims for labor and material, where the contractor made default, the owner could maintain an action on the bond without actually satisfying such claims. (*Id.*)
4. **ACTION ON BOND OF BUILDING CONTRACTOR—FINDING OF NONPERFORMANCE OF CONTRACT IN FORECLOSURE ACTION—PARTIES NOT CONCLUDED.**—In an action by the owner against the surety on a building contractor's bond, the finding of nonperformance of the contract in a lien foreclosure action, wherein the owner and surety were made parties defendant, is not conclusive as between them, where neither prayed for nor was granted any relief against the other. (*Hubermann v. National Surety Co.*, 569.)

See Appeal, 1; Attachment, 1; Husband and Wife, 2; Leases, 4; Mechanics' Liens, 1; Receivers, 1; Street Law, 24.

**BOUNDARIES.** See Condemnation of Land, 4-6; Deeds, 1, 3, 4.

**BROKERS.**

1. **SALE OF CORPORATION STOCK—LIABILITY OF CORPORATION TO SUBAGENT—FINDINGS UNSUPPORTED BY EVIDENCE.**—In this action against a corporation by the assignee of a subagent for his commission on sales of corporate stock of the defendant on an alleged agreement to make direct payment to such subagent, it is held that the evidence is insufficient to sustain the findings in favor of the plaintiff. (*Jordan v. Combined Amusements Co.*, 8.)
2. **EXCHANGE OF PROPERTY—COMPENSATION FROM BOTH PARTIES—RULE.** An agent in acting in the matter of the sale or exchange of property may not collect compensation from both parties unless each party had full knowledge of the facts concerning the agreement of the other to pay compensation. (*Riggins v. Patterson*, 319.)
3. **ACTION FOR COMMISSIONS—DOUBLE AGENCY—LACK OF KNOWLEDGE OF PARTIES—JUDGMENT WITHOUT SUPPORT.**—In an action by an agent for a commission in procuring an agreement for an exchange of real properties, where it was found that plaintiff was acting as agent for both parties, and there was no finding that both parties knew of the double agency, the judgment in favor of the plaintiff is not sufficiently supported. (*Id.*)

**BROKERS (Continued).**

4. **SALE ON DIFFERENT TERMS FROM ORIGINAL AUTHORIZATION—APPROVAL BY OWNER—RIGHT TO COMMISSION.**—Where real estate brokers, acting pursuant to a written authorization to make a sale of real estate upon certain terms, procured purchasers therefor upon somewhat different terms, and the owner accepted the deposit, signed a written approval of sale, and therein promised to pay the brokers the commission named in the authorization, the brokers were entitled to the commission, notwithstanding the sale was never consummated. (*Wood & Tatum Co. v. Basler*, 381.)
5. **ABILITY OF PURCHASER—ESTOPPEL.**—Where the owner accepts the purchaser procured by the broker, he is estopped from denying the purchaser's ability or willingness to complete the purchase. (*Id.*)
6. **ACTION FOR COMMISSIONS—EVIDENCE—OPINION OF PURCHASER'S ATTORNEY—DEFECTS IN TITLE.**—In an action to recover broker's commissions, the written opinion of the purchaser's attorney as to the title is admissible, for the purpose of showing what specifications of supposed infirmities in title were directed to the vendor's attention. (*Id.*)
7. **DEMAND FOR COMMISSIONS—INTEREST.**—Where the promise to pay a broker's commission is on demand, and the precise time when demand was made does not appear, it will be presumed that it was not made until the last moment before the filing of the complaint, and interest should be computed from that date. (*Id.*)

See *Contracts*, 37-39; *Leases*, 6; *Promissory Notes*, 7; *Trusts*, 1.

**BUILDING CONTRACTS.**

1. **DEFENSE OF LIEN CLAIMS—ATTORNEY'S FEES—RECOVERY ON BOND.** Where a building contract has been abandoned and the building completed by the owner as permitted by the contract, the owner in an action on the bond may recover money paid for attorney's fees in defending actions to recover upon lien claims. (*Cohn v. Smith*, 764.)
2. **ACTUAL PAYMENT OF ATTORNEYS' FEES—RIGHT TO RECOVERY NOT AFFECTED BY.**—The fact that a part of the attorney's fees for which compensation had been allowed in the judgment had not been actually paid does not affect the owner's right to recover therefor. (*Id.*)

See *Bonds*, 4.

**CHARTERS.** See *Municipal Corporations*, 2, 6; *Public Officers*, 6; *School Law*, 2; *Statutory Construction*, 3; *Street Law*, 15.

**CHATTEL MORTGAGES.**

1. **ACTION FOR CONVERSION—PLEADING—SUFFICIENCY OF COMPLAINT.**—In an action for the conversion of a mortgaged automobile, an allegation in the complaint "that said automobile was at said time and ever since has been in the possession of the defendant" is not in-



**CHATTEL MORTGAGES (Continued).**

consistent with the mortgagor's right to execute the mortgage, where the complaint also alleges that defendant had no title or claim to the property, since it must be assumed that defendant held the automobile as agent or trustee of the mortgagor. (*Mitchell v. Wood*, 329.)

- 2. MORTGAGE OF PROPERTY IN POSSESSION OF ANOTHER—RIGHT OF OWNER.**—The owner of personal property may execute a valid mortgage thereon, though the property at the time is in the actual possession of another. (*Id.*)

See Conversion, 1.

**CHECKS.** See Banks, 1.

**CITIES.** See Charters; Municipal Corporations.

**CIVIL SERVICE.** See Municipal Corporations, 2; Public Officers, 6.

**CLAIM AND DELIVERY.**

- 1. DAMAGES—USABLE VALUE OF PROPERTY.**—In an action for the wrongful detention of property, the ordinary measure of damages is interest, but where the property has a usable value which exceeds the lawful rate of interest, such rule has no application, and the successful party is entitled to recover, as damages for the detention, the value of such use during the period that he was wrongfully deprived thereof, which value is to be estimated by the ordinary market price of the use of the property. (*Tucker v. Hagerty*, 789.)
- 2. RECOVERY OF POSSESSION OF AUTOMOBILE—WRONGFUL SEIZURE BY OFFICER—RENTAL VALUE AS DAMAGES.**—In an action in claim and delivery to recover the possession of an automobile wrongfully seized by an officer under a writ of attachment, the trial court is authorized under section 667 of the Code of Civil Procedure to fix damages for detention on basis of rental value, although it amounts to more than the value of the machine. (*Id.*)

See Appeal, 11; Contracts, 41.

**CLAIMS.** See Public Officers, 2, 4, 5.

**COLLATERAL ATTACK.** See Highways, 3, 4.

**COMMISSIONS.** See Brokers, 4, 5; Leases, 6; Trusts, 1.

**COMPENSATION.** See Attorney and Client, 1; Counties, 1, 2; Public Officers, 1, 4, 7.

**COMPROMISE.** See Judgments, 3.

CONDEMNATION OF LAND.

1. **EMINENT DOMAIN—DESCRIPTION OF LAND—PLEADING—REFERENCE TO DEED.**—In a proceeding in eminent domain by the city of Oakland to condemn defendants' property for a public park, a reference in the complaint to a deed from the Oakland Waterfront Company to the city of Oakland, which deed described the westerly line of the park lands as the easterly line of Rancho San Antonio, as finally determined and patented to V. and D. Peralta by the United States of America, between stations 131 and 134, and which described the easterly line of the Peralta grant of the San Antonio Rancho between the stations as the meandering line along the west shore of San Antonio Creek at the line of ordinary high water, had the same effect as if the description were incorporated in the complaint. (*City of Oakland v. Adams*, 614.)
2. **DESCRIPTION OF LAND—UNCERTAINTY AS TO ONE BOUNDARY—REFERENCE TO INSTRUMENTS.**—In such a proceeding, where the complaint alleged that the tract sought to be condemned was the whole of an entire tract, and three boundaries thereof were described with certainty, except as to the length of two of them, the pleading sufficiently informed the defendants of the land the plaintiff sought to take, where the remaining boundary was described with reference to other instruments. (*Id.*)
3. **EVIDENCE—TESTIMONY OF DEFENDANT—INTENTION IN ERECTING FENCE—QUESTION FOR JURY.**—In such a proceeding, the question of construction of the testimony of one of the defendants, who erected a fence on the property, as to whether it was his intention to thereby mark the boundary, was for the jury, and any knowledge gained by them in viewing the property was independent evidence, which they might take into consideration. (*Id.*)
4. **LOCATION OF BOUNDARIES—DUTY OF COURT.**—In such a proceeding, the court should determine the boundaries of the land sought to be condemned and locate such boundaries upon the ground. (*Id.*)
5. **FAILURE TO LOCATE BOUNDARIES—HARMLESS ERROR.**—In such a proceeding, where the jury found the boundary of the property to be at fence line, and the court adopted such finding, and the jury evidently based its verdict on such line, the failure to locate the boundaries on the ground was harmless error. (*Id.*)
6. **DESCRIPTION OF PROPERTY—FAILURE OF PLAINTIFF TO INTRODUCE EVIDENCE—SUBSEQUENT PROOF BY DEFENDANTS—ERRONEOUS DENIAL OF NONSUIT HARMLESS ERROR.**—Where, in such a proceeding, the plaintiff rested its case without introducing any evidence to identify the land described in the complaint, and the sufficient instruments were subsequently introduced by the defendants, and much evidence was taken as to the location of the boundary line, including the examination of the premises by the court and jury, there was no error, in view of section 4½ of article VI of the constitution, in denying a motion for nonsuit at close of plaintiff's testimony. (*Id.*)

**CONDEMNATION OF LAND (Continued).**

7. **APPEAL—IMPROPER QUESTIONS—FAILURE TO REQUEST ADMONITION TO DISREGARD—INSUFFICIENT GROUND FOR REVERSAL.**—In such a proceeding, it cannot be urged on appeal that certain questions asked of expert witnesses were injurious for the reason that they placed before the jury certain facts, where no request was made for an admonition to the jury to disregard the implications. (Id.)
8. **LIMITATIONS OF CROSS-EXAMINATION OF EXPERT WITNESS—DISCRETION NOT ABUSED.**—In such a proceeding, it was not an abuse of discretion to refuse to permit an expert witness to answer questions on cross-examination as to the character of the property and its suitability for residence purposes, where the matter had already been gone into. (Id.)
9. **VALUE OF LAND—PROPOSED USE BY CITY—IMPROPER ELEMENT.**—In such a proceeding, an objection to a question asked of one of defendants' expert witnesses whether in estimating value he considered the purpose for which the city was endeavoring to acquire the land was properly sustained. (Id.)
10. **INTEREST OF WITNESS IN ADJACENT LAND—PROPER QUESTION.**—In such a proceeding, it was error to sustain an objection to a question asked of a real estate agent, who had estimated values for the city, as to whether he was interested in the sale of land that would be benefited by the park, but such error was harmless where the jury did not adopt his estimate of value. (Id.)
11. **KNOWLEDGE OF GEOLOGY OF ESTUARY.**—In such a proceeding, where an expert witness testified that in fixing value of the property he took into consideration the depth of the mud and marsh portion of it and the cost of filling, there was no error in not permitting him to give an answer to the general question of his knowledge of the geology of the estuary in question. (Id.)
12. **LOCATION OF BOUNDARY—DUTY OF DEFENDANTS—HARMLESS INSTRUCTION.**—In such a proceeding, the defendants were not harmed by an instruction that the duty to prove the location of the boundary line of the property rested upon the defendants, since the complaint sufficiently described the property, and the court and jury in hearing the evidence definitely found the boundaries. (Id.)

**CONSIDERATION.** See Contracts, 1, 7; Promissory Notes, 1, 5, 8.

**CONSPIRACY.** See Execution Sales, 1.

**CONSTITUTIONAL LAW.** See Contracts, 2-4; Jury Trials, 2; Reclamation Districts, 5; Street Law, 10; Wages, 1.

**CONSTRUCTION.** See Negligence, 14.

**CONTEMPT.**

1. **ANNULLMENT OF UNWARRANTED ORDER—WRIT OF REVIEW.**—An unwarranted order adjudging one guilty of contempt may be annulled upon a writ of review. (*Goodall v. Superior Court*, 723.)
2. **VIOLATION OF INJUNCTION—DISMISSAL OF PROCEEDINGS—LACK OF GROUND—ANNULMENT OF ORDER.**—Where in a proceeding instituted by the beneficiary under a judgment granting an injunction, the disobedience of which is made to appear, the court without any ground therefor denies to such beneficiary the process of the court, which constitutes the only means of enforcing the judgment, such order should be annulled. (*Id.*)
3. **AFFIRMATIVE ALLEGATIONS IN AFFIDAVIT—TRIAL.**—Affirmative allegations contained in an affidavit of the defendant in contempt proceedings for the disobedience of an injunction cannot be deemed established without a trial to determine the issues so joined. (*Id.*)
4. **ACT CONSTITUTING CRIME—STATUTE OF LIMITATIONS.**—When an act sought to be punished constitutes a crime, the court may by analogy adopt the limitation prescribed by statute for criminal prosecutions. (*Id.*)
5. **VIOLATION OF INJUNCTION—FLOW OF WATER—TIME FOR CONTEMPT PROCEEDINGS.**—The beneficiary under a judgment perpetually enjoining the obstruction of a flow of water is not barred from instituting contempt proceedings against a person violating the injunction by failure to bring the proceedings within a particular time, unless the obstruction has continued under circumstances and for a period of time from which a grant so to do would be implied. (*Id.*)
6. **DELAY OF FOUR YEARS—PROCEEDING NOT BARRED BY LACHES.**—The failure to bring contempt proceedings until after the obstruction had continued for four years did not in itself constitute laches. (*Id.*)
7. **RIGHT TO INSTITUTE PROCEEDINGS—MATTERS NOT AFFECTING.**—The willingness of the beneficiary under a judgment restraining the obstruction of a flow of water to waive his rights thereunder provided the person violating the judgment would pay the expense of protecting his land from overflow, and his motive in instituting contempt proceedings to compel such payment, does not affect the rights to institute such contempt proceedings. (*Id.*)
8. **ORDER TO SHOW CAUSE—PERSONAL APPEARANCE.**—An order adjudging a person in contempt of court for failing to appear in person in response to an order to show cause is unwarranted and in excess of the jurisdiction of the court where appearance is made by her attorney and presentation of her affidavit showing inability to comply with the order of the court. (*Bakeman v. Superior Court*, 785.)
9. **PUNISHMENT FOR CONTEMPT—ABILITY TO COMPLY WITH ORDER.**—An order adjudging a person in contempt of court for failure to

**CONTEMPT (Continued).**

perform an act directed by the court is void, as a basis for the imposition of punishment, unless it appears that it is within the power of such person to perform the act. (Id.)

**CONTINUANCES. See Intoxicating Liquors, 2.****CONTRACTS.****1. GRANT OF RIGHT OF WAY TO TELEGRAPH COMPANY—TELEGRAPH PRIVILEGES AS CONSIDERATION—BREACH—MONEY OBLIGATION.—**

Where a contract between a property owner and a telegraph company granting to the latter a right of way over the lands of the former provided that the consideration for the grant was "telegraph privileges to the amount of one thousand five hundred dollars, which said amount shall be taken in the use of telegraph privileges at the usual and ordinary rates," on the failure of the company to issue to such grantor any telegraph franks or allow him any telegraph privileges, by reason of the passage of laws prohibiting telegraph companies from issuing franks for any consideration except cash, the contract, in view of section 1451 of the Civil Code, became one to pay the sum of money designated as the consideration for the privileges granted by the contract, since the amount of money named in the contract was the exact equivalent of the value of the privileges which the obligor was compelled to furnish. (*Irvine v. Postal Telegraph-Cable Co.*, 60.)

**2. PROHIBITION OF FRANKING PRIVILEGE—STATE PUBLIC UTILITIES ACT—PRIOR CONTRACT UNAFFECTED AS TO INTRASTATE MESSAGES.—**

The State Public Utilities Act prohibiting telegraph companies from issuing franks for any consideration, except cash, does not impair the validity of a contract granting a right of way in consideration of telegraph privileges executed prior to the passage of such act, in so far as the furnishing of franks for intrastate messages is concerned, in view of section 10, article I, of the federal constitution prohibiting any state from passing a law impairing the obligation of contracts. (Id.)

**3. ILLEGALITY OF CONTRACT AS TO INTERSTATE MESSAGES—VALIDITY AS TO INTRASTATE MESSAGES—SEVERABLE CONTRACT.—**

A contract providing for the furnishing of franking privileges in consideration of the grant of a right of way, which became void as to interstate messages by the passage of the Interstate Commerce Act, is not also void, as to intrastate messages, since the contract as to interstate and intrastate messages was clearly separable in fact and law. (Id.)

**4. ACTION ON QUANTUM MERUIT—VALUE OF RIGHT OF WAY—CONTINUANCE IN POSSESSION—PLEADING—SUFFICIENCY OF COMPLAINT.—**

In an action against a telegraph company on a *quantum meruit* for a right of way granted it for a pole line after the consideration for

CONTRACTS (Continued).

the grant had become partly illegal, the complaint is not subject to the objection that it failed to allege that defendant continued in possession after a stated date, where it is alleged that the value of the right of way and the use and enjoyment thereof up to that date was one thousand five hundred dollars. (Id.)

5. **ILLEGAL CONTRACT—SUBSEQUENT LEGISLATION—RULE AS TO PARTIES IN PARI DELICTO INAPPLICABLE.**—The rule that where parties to an illegal contract are in *pari delicto*, the court leaves them as it finds them, does not apply where the contract was a legal, just, and equitable one when made, but has become unlawful in part by subsequent legislation. (Id.)
6. **ACTION FOR SERVICES—CONTRACT OF EMPLOYMENT—LIABILITY OF DEFENDANT—SUFFICIENCY OF EVIDENCE.**—In this action for services of a physician rendered to a third party, it is held to be a fair inference from the testimony that the services were performed upon the reliance that the defendant would pay therefor, and that the latter directly promised to make such payment. (*Meyers v. McKillop*, 144.)
7. **ORIGINAL CONTRACT—SUFFICIENCY OF CONSIDERATION.**—Where services were performed for the benefit of a third party in reliance that defendant would pay therefor, and defendant directly promised to pay, an original contract was thereby constituted with a sufficient consideration for its support. (Id.)
8. **SPECIFIC PERFORMANCE—CONTRACT IMPOSSIBLE TO ENFORCE.**—When the enforcement of a contract by decree of court is difficult or practically impossible, specific performance will not be granted. (*Anderson v. Neal Institutes Co.*, 174.)
9. **INJUNCTION — BREACH OF CONTRACT — AFFIRMATIVE AND NEGATIVE COVENANTS IMPOSSIBLE OF ENFORCEMENT.**—In view of subdivision 5 of section 526 of the Code of Civil Procedure, providing an injunction cannot be granted to prevent the breach of a contract the performance of which could not be specifically enforced, a contract containing affirmative and negative covenants impossible of enforcement will not support a suit for an injunction to restrain breach. (Id.)
10. **CONTRACT TO PREPARE AND FURNISH MEDICINES—EXCLUSIVE RIGHT TO USE—PREVENTION OF BREACH.**—An injunction will not lie to prevent the breach of a contract requiring a medical institute company to prepare and furnish medicines and advertising literature and to give plaintiff the exclusive right to use the remedies. (Id.)
11. **VENDOR AND PURCHASER—TITLE FREE FROM DEFECTS—CHANGE OF RECORDS—LIABILITY OF PURCHASER.**—Under the terms of a contract for the sale of real property requiring the vendor to furnish an abstract showing title free from defects, the purchaser is not obliged

**CONTRACTS (Continued).**

to accept title, make payments, or forfeit payments made, where the abstract shows that a deed necessary to complete the title which was recorded in the name of one "Robbins," as grantee, was changed by the county recorder by striking out the name "Robbins" and substituting the name "Robben," with a marginal insertion of the date and initials of such official, such change being made thirty-eight years after the recording of the deed and by a different recorder. (*Robben v. Benson*, 227.)

12. **ACTION FOR FORECLOSURE BY VENDOR AFTER BREACH—RECOVERY ON MONEY PAID AND DAMAGES—RIGHT OF PURCHASER.**—Where a vendor, after breach of contract to furnish an abstract showing title free from defects, commences an action to foreclose the purchaser's rights under the contract of sale, and the purchaser, within the time for answering, surrenders the land, he may file a cross-complaint to recover installments paid and damages for the breach. (*Id.*)
13. **SINKING OF WELL—DEPTH AT WHICH DRILLING MIGHT BE STOPPED—CONSTRUCTION.**—A contract to sink a well to a minimum depth of one hundred and fifty feet, but not to exceed five hundred feet, and providing that the contractor might stop drilling after reaching the minimum depth, permits the driller to stop at any time after reaching one hundred and fifty feet. (*Wilson v. Fuller*, 355.)
14. **RECOVERY OF FULL AMOUNT EARNED—RIGHT OF CONTRACTOR.**—Under such a contract, the contractor can recover the full amount earned, although the contract required only half payment at the reaching of each one hundred feet in the digging. (*Id.*)
15. **STREET RAILWAY ADVERTISING—NONPERFORMANCE—INSUFFICIENCY OF EVIDENCE.**—In this action by a street railway advertising company to recover payments due under an advertising contract, it is held that the evidence is not sufficient to support the finding of nonperformance of the contract. (*Pacific Rys. Adv. Co. v. Leon C. Co.*, 387.)
16. **ATTORNEY AND CLIENT—JOINT EMPLOYMENT—ACTION FOR SERVICES—EVIDENCE—LIABILITY OF DEFENDANTS.**—Where in an action against two corporations for professional services rendered by plaintiff as an attorney at law the evidence shows a joint employment, and does not show any agreement that the compensation of plaintiff should be divided and paid separately by defendants in proportion to the services to be rendered to them separately, it cannot be contended by one of the defendants that its codefendant ought to pay a larger portion of the fee because of the rendition of more difficult service, since such matter was one for adjustment between defendants, and not a matter with which plaintiff was concerned. (*Wheeler v. Houston, Gore & Loy*, 407.)
17. **SALE OF CEMENT—QUALITY—SATISFACTION OF ENGINEER OF HIGHWAY COMMISSION.**—Where a letter ordering cement provided that

## CONTRACTS (Continued).

- the cement should comply with inclosed specification of the highway commission and be acceptable to their engineer, and in reply thereto the letter of the seller stated that the cement "will easily meet the specifications of the commission," after which communications passed relating to the price alone, the contract called for cement acceptable to the engineer. (*Doran, Brouse & Price v. H. Cowell Co.*, 478.)
18. EVIDENCE—TERMS OF CONTRACT—PRELIMINARY NEGOTIATIONS.—Where a contract for the sale of cement consisted of letters and telegrams, it was error to admit oral evidence as to the terms of the contract and of the negotiations leading up to the same, but such error was harmless where the letters and telegrams clearly showed the contract. (*Id.*)
19. RECOVERY FOR BREACH OF CONTRACT—REJECTION OF CEMENT BY HIGHWAY COMMISSION INSUFFICIENT.—Where a contract for the sale of cement provided that the cement should meet the specifications of the highway commission and be acceptable to their engineer, the mere rejection of the cement by the commission, apart from the question of its quality, was not a compliance with the contract by the buyer, and, while a rejection by the engineer would be *prima facie* conclusive, such decision could be impeached for gross mistake amounting to fraud. (*Id.*)
20. PLEADING—INSUFFICIENT COMPLAINT.—In action for breach of contract to deliver cement conforming to the specifications of the highway commission and acceptable to its engineer, the plaintiff cannot recover on the theory of the rejection of the cement by the engineer where the only allegation in the complaint was that the cement had been rejected by the highway commission. (*Id.*)
21. HAULING OF ROCK AND SAND—DEFAULT OF HAULERS—DEMURRAGE CHARGES—COSTS OF GASOLINE AND OIL—PRIORITY IN PAYMENT—RIGHT OF CONTRACTOR.—Under a contract for hauling rock and sand, wherein the haulers agreed to save the contractor harmless from demurrage charges, and the contractor agreed to pay for all the gasoline and lubricating oil used in the hauling, the contractor had the right, upon the default of the haulers after permitting demurrage to accrue and contracting a bill for gasoline and oil, to first retain out of the sums due the haulers the amount of the demurrage charges. (*Ferguson v. Marsh*, 482.)
22. PAYMENT OF GASOLINE AND OIL—NATURE OF CONTRACT.—Under such a contract, the agreement to pay for gasoline and oil is not a contract made expressly for the benefit of a third person, which the seller of the oil could enforce. (*Id.*)
23. LETTERS—PAROL EVIDENCE—PRELIMINARY NEGOTIATIONS—CIRCUMSTANCES AND SITUATION OF PARTIES.—In an action to recover a balance due on an alleged contract, evidenced by letters, parol testi-



## CONTRACTS (Continued).

mony as to oral negotiations prior to the writings is admissible for the purpose of showing the circumstances and situation of the parties. (*J. & H. Goodwin, Ltd., v. Franich*, 493.)

24. **ACKNOWLEDGMENT AND PROMISE TO PAY INDEBTEDNESS—COVENANT NOT TO SUE—MORAL OBLIGATION.**—A written acknowledgment and agreement to pay an indebtedness providing that it is part and parcel of the acknowledgment that it shall be void should legal steps of any kind be taken to force payment, or should the indebtedness be transferred without the permission of the debtor, is a valid and enforceable covenant not to sue, and the promise to pay constitutes merely a moral obligation. (*Smith v. Macdonald*, 503.)
25. **ACTION TO REFORM CONTRACT—SETTLEMENT OF PROPERTY RIGHTS OF MARRIED PERSONS—DECREE IN DIVORCE ACTION NOT RES JUDICATA.**—Where in an action for divorce the husband and wife adjust their property rights without the intervention of the court pending the action, the decree determining that the property be awarded to the respective parties in accordance with their agreement is not *res adjudicata* so as to bar an action by the wife to reform the description of certain real property contained in the agreement. (*Buick v. Boyd*, 508.)
26. **SALE OF CALCULATING MACHINES—REPUDIATION BY PRINCIPAL—ESTOPPEL TO CLAIM FORFEITURE.**—In an action by an agent on a contract of employment for the sale of calculating machines, providing for forfeiture if he did not sell fifty machines the first year, where the defendants repudiated the contract two and one-half months after it had been executed, they were estopped from claiming forfeiture for nonsale of the required number of machines. (*Erskine v. Marchant*, 590.)
27. **PROFITS FROM SALES OF OTHER MACHINES—MITIGATION OF DAMAGES—LACK OF EVIDENCE.**—In such an action, profits made by plaintiff on sales of machines purchased by him from another firm are not available in mitigation of damages, in the absence of evidence as to the capital invested by plaintiff or how many he sold. (*Id.*)
28. **COMMERCIAL AGENTS AND PRINCIPALS—DAMAGES FOR BREACH.**—While contracts between commercial agents and their principals embody many elements of uncertainty, damages for breach thereof are not speculative or remote, and such compensation will be awarded as the evidence shows with reasonable certainty the wronged party is entitled to. (*Id.*)
29. **ACTION FOR GOODS SOLD—PURCHASE FROM AGENT—RIGHT TO SUE—ESTOPPEL.**—In an action on an account for goods sold by plaintiff as agent, the defendant is estopped from asserting that plaintiff had not the right to sue on the claim, where he bought with knowledge that by plaintiff's agency contract plaintiff guaranteed payment

CONTRACTS (Continued).

- within a certain time, regardless of whether he received payment from the defendant or not. (*Holland-Meisell Co. v. Kelly*, 610.)
30. **LANDLORD AND TENANT—RENTAL OF MARKET STALL—RIGHT OF RENTER TO SELL INTEREST—CONSTRUCTION OF AGREEMENT.**—An agreement between the owners of a market and the renter of a stall therein giving the latter the right to sell his interest in the stall upon condition that the purchaser pay a monthly rental does not make the right of sale dependent upon the suitability of the purchaser, except as to payment of rent, if that be classed as suitability. (*Herman v. Rohan*, 678.)
31. **STATUTE OF FRAUDS—RIGHT TO SELL INTEREST IN STALL.**—An agreement between the owners of a market and the renter of a stall therein giving the latter the right to sell his interest in the stall is not one which, by its terms, was not to be performed within a year from the making thereof under subdivision 1 of section 1973 of the Code of Civil Procedure. (*Id.*)
32. **SALE OF INTEREST IN STALL—RIGHT OF RENTER.**—The owners of a market in renting a stall, even considering the matter a personal privilege or license, have the right to agree that the renter may sell such privilege. (*Id.*)
33. **TERM OF HIRING—RIGHT TO SELL INTEREST.**—Where in the renting of a market stall no term is agreed upon and a monthly rent is paid, it is presumed, under section 1943 of the Civil Code, that the hiring is for a year, and where possession is continued beyond the year and rent accepted, the hiring is presumed to be resumed from month to month upon the same terms, and the interest of the hirer is more than a privilege, he having the right to sell and assign his interest in the stall. (*Id.*)
34. **SUITABILITY OF PURCHASER—IMPLIED CONDITION—EFFECT OF RIGHT TO SELL INDEPENDENT OF AGREEMENT.**—Where the renter of a market stall, aside from the agreement of hiring, has the right to sell and assign his interest, any implied condition that in case of sale the purchaser should be a suitable person is wiped out, and the renter may sell to whomsoever he chooses, so long as the purchaser pays the rent. (*Id.*)
35. **DEED OF TRUST—GRANT OF REAL PROPERTY—ASSUMPTION OF PAYMENT—EVIDENCE—COVENANT IN GRANT DEED.**—An agreement on the part of the grantee of real property encumbered with a deed of trust to pay the note secured by the trust instrument is sufficiently proven by the existence of a covenant to that effect in the deed of the grantee and his recognition of its existence. (*Dutton v. Locke-Paddon*, 693.)
36. **ASSUMPTION OF DEBT—NATURE OF PROMISE.**—It is not necessary that there should be any formal promise on the part of the grantee of mortgaged premises to pay the mortgage to render him liable

**CONTRACTS (Continued).**

therefor if his obligation so to do appears from a consideration of the entire conveyance; it may be made orally or in a separate instrument, or it may be implied from the transaction between the parties, or it may be shown by the circumstances under which the purchase was made, as well as by the language used in the instrument. (Id.)

37. **BROKER'S COMMISSIONS—ACCEPTANCE OF PURCHASER—ADMISSION OF ABILITY.**—Where an owner of real property accepts the offer therefor made by a person produced by the broker employed to make the sale, he thereby admits the readiness, willingness, and ability of the purchaser to consummate the sale. (*Sobaje v. Schubert*, 709.)
38. **NEGOTIATION OF SALE—RIGHT TO COMMISSIONS—WHEN COMPLETE.** When a broker employed simply to negotiate a sale of real estate has found a purchaser ready, able, and willing to purchase upon the vendor's terms, his right to the agreed commission is complete, and not contingent upon the consummation of the sale. (Id.)
39. **BROKER'S COMMISSIONS—CONTRACT OF EMPLOYMENT—DEFECT IN DESCRIPTION—PAROL TESTIMONY.**—In an action to recover a commission claimed to have been earned for securing the acceptance of an offer to exchange real property, it is not error to permit the plaintiff to remedy by oral testimony a defective description in the broker's contract of employment. (*Macknight v. Davitt*, 720.)
40. **CORPORATION LAW—ACCEPTANCE OF OFFER OF EXCHANGE OF REAL PROPERTY—AUTHORITY.**—A written acceptance by a corporation of an offer to exchange real property is sufficiently shown to have been made under the authority of the board of directors where the acceptance contained the signatures of the vice-president and secretary and the corporate seal. (Id.)
41. **CLAIM AND DELIVERY—PLAINTIFF'S OWNERSHIP OF CATTLE—TRANS-ACTION BETWEEN PLAINTIFF AND THIRD PARTY—PLEADING—AGREEMENT TO SELL.**—In an action in claim and delivery to recover the possession of six head of cows, the plaintiff was not entitled to recover on the theory that he was the owner thereof, where he alleged a transaction between himself and a third party by the terms of which he sold to the latter eight head of horses, and the latter partly paid therefor in cash, and "agreed to sell and deliver" to plaintiff on a stated date six head of cows for the balance, but instead of so doing, sold the cows to the defendant, since such a transaction constituted only an agreement to sell and not an agreement of sale. (*Alsaga v. Hart*, 770.)
42. **SPECIFIC PERFORMANCE—CONTRACT FOR CARLOAD OF IRON—UNCERTAINTY AS TO QUANTITY.**—A contract for a carload of iron is enforceable, notwithstanding the parties in making the contract did not state how much iron should constitute a carload and did not

**CONTRACTS (Continued).**

attempt to provide what should be either the minimum or maximum amount of iron in such carload. (*Dutwiler v. Klunk*, 796.)

See Bonds, 1-3; Brokers, 4; Building Contracts; Corporations, 5, 6; Counties, 2; Judgments, 20; Promissory Notes, 2; Services, 1; Street Law, 4, 5; Trusts, 14; Vendors' Liens, 1-5.

**CONVERSION.**

1. **CHATTEL MORTGAGE—CONVERSION OF MORTGAGED PROPERTY—LIABILITY FOR DEBT.**—One who converts personal property which is subject to a chattel mortgage is liable to the mortgagee for the full amount due under the mortgage. (*Mitchell v. Wood*, 329.)
2. **LEASE OF FARMING LAND ON SHARES—SEIZURE OF WHOLE CROP BY LESSOR—LIABILITY TO MORTGAGEE OF LESSEE.**—Where land is leased to be farmed on equal shares, and the lessor attaches and takes possession of the whole crop, and personally and through the sheriff refuses upon demand to deliver the other one-half thereof to the holder of an overdue note secured by chattel mortgage on such one-half with the right of possession upon failure to pay the note, such lessor is guilty of conversion. (*Moosios v. Rusconi*, 471.)

See Attorney and Client, 1; Sales, 10.

**CORPORATIONS.**

1. **TRANSFER OF PROPERTY—ISSUANCE OF STOCK BY TRANSFEREE—VALIDITY OF TRANSACTION—QUESTION NOT PRESENTABLE IN STOCKHOLDERS' LIABILITY ACTION.**—In an action to recover judgment upon the statutory liability of certain stockholders of a corporation, the defendants cannot question the validity of a transaction between the corporation and its corporate predecessor in business, by the terms of which the assets and business of the latter were taken over by the former and stock in the new corporation issued to the stockholders, although the transaction was in violation of section 309 of the Civil Code and sections 1227-1232 of the Code of Civil Procedure. (*Huey v. Patterson*, 335.)
2. **ACTION UPON STOCKHOLDERS' LIABILITY—OWNERSHIP OF STOCK—EVIDENCE.**—In an action upon the statutory liability of stockholders in a corporation, proof of ownership of stock at a certain time is sufficient to show ownership at the time the liability was incurred, in the absence of evidence to the contrary. (*Id.*)
3. **VOID ASSESSMENT—RECOVERY OF MONEY PAID.**—Stockholders of a corporation may recover of the corporation the amounts paid by them under a void assessment. (*Id.*)
4. **RECOVERY OF SUBSCRIPTION PRICE OF STOCK—NATURE OF STOCK—SUPPORT OF FINDING—ABSENCE OF BILL OF EXCEPTIONS.**—In an action on a promissory note given for the subscription price of stock, it cannot be contended on appeal that the stock which the

## CORPORATIONS (Continued).

corporation is able to issue to the appellant is not the original issue for which he subscribed, but stock returned to the treasury charged with a contingent liability, where the appeal is taken upon the judgment-roll alone, without a bill of exceptions, since the finding of the trial court that the stock is the proper stock to be issued must be assumed to be supported by the evidence. (*Pasadena Rapid Transit Co. v. Munson*, 352.)

5. **CONTRACT FOR ORIGINAL ISSUE OF STOCK IN EXCHANGE FOR PROPERTY—SUBSCRIPTION TO STOCK.**—A contract for an original issue of shares of stock in exchange for property is in legal effect but a subscription to stock, even if it be not a subscription contract in form. (*Id.*)
6. **CANCELLATION OF SUBSCRIPTION TO STOCK.**—A corporation may, under certain circumstances, and certainly as against all but existing creditors, cancel a subscription to stock, especially if the cancellation relate to only a part of the shares subscribed for. (*Id.*)

See *Contracts*, 40.

## COSTS.

1. **WAIVER OF FINDINGS—RUNNING OF TIME OF SERVICE AND FILING.**—Where findings of fact are waived, an entry on the minutes of the court directing judgment for one or the other of the parties constitutes the decision of the court, and the time for serving and filing memorandum of costs commences to run from the minute entry date, or the date of notice, to the party claiming costs, of such minute entry. (*Collins v. Belland*, 139.)
2. **ACTIONS IN JUSTICES' COURTS—RIGHT TO SUE IN FORMA PAUPERIS.**—The township justices' courts of this state are, as were courts at common law, vested with power to, and should upon a proper showing, admit parties to sue in *forma pauperis*, since the statutory provisions with reference to prepayment of costs are not applicable to the exceptional cases of indigent suitors who at common law were entitled to sue without payment of such costs. (*Hammond v. Justice's Court*, 506.)

See *Appeal*, 10.

## COUNTIES.

1. **LEGAL SERVICES—PROSECUTION OF DISTRICT ATTORNEY FOR MISCONDUCT—COUNTY CHARGE.**—In view of section 4307, subdivision 3, of the Political Code, services rendered by attorneys at law appointed by a judge of the superior court to prosecute a district attorney for misconduct in office, pursuant to the provisions of sections 758 and 771 of the Penal Code, constitute a "county charge." (*Gibson v. County of Sacramento*, 523.)

**COUNTIES (Continued).**

2. **CLAIM AGAINST COUNTY — STATUTORY AUTHORIZATION.**—One who demands payment of a claim against a county must show some statute authorizing it, or that it arises from some contract, express or implied, which finds authority in law. (Id.)

**COURTS. See Justices' Courts.****CRIMINAL LAW.**

1. **PRINCIPALS IN COMMISSION OF CRIME.**—One who aids and abets in the commission of a crime, though not present when the act, the final step in its commission, is committed, is logically a principal, whatever may have been the character, nature, quality, or extent of the assistance contributed by him toward its consummation or the execution of the intent jointly formed by him and the actual perpetrator of the act to do the wrongful act. (People v. Ah Gee, 1.)
2. **PRINCIPALS AND ACCESSORIES — DISTINCTION ABROGATED — CHARGE AND TRIAL OF ACCESSORY AS PRINCIPAL.**—The distinction existing at common law between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, has been abrogated, and all persons concerned in the commission of a felony are to be prosecuted, tried, and punished as principals, and no other facts need be alleged in any indictment or information against such an accessory than are required in an indictment or information against his principal. (Id.)
3. **MURDER — DEFENDANT'S CONNECTION WITH CRIME — EVIDENCE — INCONSISTENT THEORIES — INSUFFICIENT GROUND FOR REVERSAL.**—Under an information charging the defendant jointly with two other persons of the crime of murder, without any attempt at describing how or in what manner the act was committed, or any allegation that the defendant was merely an aider and abettor of the crime, the prosecution was entitled to prove the charge by any testimony which would reveal the defendant's connection therewith, and the fact that there was testimony which tended to establish two different theories upon which the defendant may have been a participant in the commission of the crime, is no ground for reversal of the judgment. (Id.)
4. **MISCONDUCT OF DISTRICT ATTORNEY — DENIAL OF MOTION FOR NEW TRIAL — FINDINGS ON CONFLICTING EVIDENCE — APPEAL.**—In denying a motion for a new trial in a criminal action, the findings on conflicting evidence as to the alleged misconduct of the district attorney must prevail on appeal. (People v. Gastone, 51.)
5. **CONTRIBUTING TO DELINQUENCY OF MINOR — INFORMATION — STATUTE OF LIMITATIONS.**—An information filed November 2, 1917, charging that between October 1, 1916, and October 1, 1917, the defendant "did then and there willfully and unlawfully take and entice" his

## CRIMINAL LAW (Continued).

- victim "away from her home and usual place of abode and did on various dates and times induce" her "to accompany defendant to various hotels and rooming-houses in the city of San Diego, and there occupy the same room and bed with defendant, and that said defendant did then and there have and accomplish sexual intercourse with" her, was sufficient as against the objection that the charge was barred by the statutory limitation of one year. (*People v. Brown*, 101.)
6. **CONCLUSION OF LAW—SURPLUSAGE IN INFORMATION.**—Such an information is not insufficient in also charging the defendant with having induced the girl "to so live as would cause and manifestly tend to cause" her "to become and remain a person coming within the provisions of the juvenile court law of the state of California," as the same may be regarded as surplusage, in view of the definite charge in the information. (*Id.*)
7. **RELATIONSHIP OF PARTIES—LACK OF AVERMENT OF MAN AND WIFE—SUFFICIENCY OF INFORMATION.**—Such an information is not insufficient for failure to allege that the defendant and the girl were not man and wife at the time of the commission of the alleged acts, where the pleading does show that their surnames were different, that she was but fifteen years of age, and that he took and enticed her from her usual place of abode and induced her to live with him at various hotels and rooming-houses, where they were sexually familiar with each other. (*Id.*)
8. **INFORMATION—DOUBLE CHARGE—LACK OF PREJUDICE—SAME CLASS OF CRIMES.**—In view of section 954 of the Penal Code, which provides that an indictment or information may charge two or more different offenses connected together in their commission, or two or more different offenses of the same class of crime or offenses, under separate counts, an information charging the defendant under two counts with having committed the crime of rape, and with having committed lewd and lascivious acts, such as are described by section 288 of the Penal Code, is without prejudice, where both crimes were alleged to have been committed on the same day and with the same female child, and the defendant found guilty of the second offense charged. (*People v. Warriner*, 107.)
9. **MURDER—INTEMPERATE REMARK OF DISTRICT ATTORNEY—INSUFFICIENT GROUND FOR REVERSAL.**—In a prosecution for murder, the statement of the district attorney in his closing address to the jury that the defendant, if turned loose, would go back and mix a little more booze with her Indian blood, and kill another man, while somewhat intemperate, is not a sufficient ground for reversal. (*People v. Frost*, 120.)
10. **COMMUNICATION TO JUROR AFTER RETIREMENT—LACK OF PREJUDICE.**—In such a prosecution, the act of the sheriff, after the jury retired, in transmitting a communication to one of the jurors from

**CRIMINAL LAW (Continued).**

his wife to the effect that anthrax had appeared among the juror's cattle cannot be held to have influenced such juror to consent to a verdict by reason of the urgent necessity for his presence at home. (*Id.*)

11. **SUSPENSION OF SENTENCE—REVOCATION OF ORDER—ABSENCE FROM STATE—JURISDICTION.**—In a criminal action, the superior court is without jurisdiction to set aside an order suspending sentence and releasing the defendant on probation for violation of the order, where the probationary period has expired, since the power to revoke or modify the order is limited to the period of probation, and the term of probation does not cease to run during the absence of the defendant from the state. (*People v. O'Donnell*, 193.)
12. **FAILURE TO FILE BRIEF OR APPEAR—DISMISSAL OF APPEAL.**—An appeal in a criminal case may properly be dismissed where the appellant fails to file a brief in support of his appeal, or to appear before the court on the date set for the argument thereof. (*People v. Martin*, 213.)
13. **ASSAULT WITH DEADLY WEAPON WITH INTENT TO COMMIT MURDER—EVIDENCE—CERTAINTY OF WITNESS AS TO IDENTIFICATION OF DEFENDANT—ARGUMENTATIVE QUESTION—EXCLUSION OF ANSWER HARMLESS ERROR.**—In a prosecution for assault with a deadly weapon with intent to commit murder, where the prosecuting witness positively identified the defendant, the latter was not prejudiced by the refusal of the court to permit an identifying witness to answer the question as to whether he would be as sure about identification if the defendant were on trial for murder. (*People v. Eantosca*, 515.)
14. **BROKEN SHOVEL AND CLUB—ADMISSIBILITY.**—In such a prosecution, where the sheriff identified a broken shovel and a club as having been found at the place of the assault and the prosecuting witness stated that he thought he was struck with such weapons, which bore blood-stains, such weapons were admissible in evidence. (*Id.*)
15. **MURDER—EVIDENCE—INSTRUCTION AS TO MANSLAUGHTER—PROPER REFUSAL.**—Where in a prosecution for murder the evidence showed the deceased was deliberately and wantonly shot to death without cause or provocation, and the defendant relied upon and attempted to establish an alibi, the court properly refused to give an instruction defining manslaughter. (*People v. Yee*, 579.)
16. **AIDING, ASSISTING, AND ABETTING IN COMMISSION OF CRIME—GUILT OF ACCESSORY—PROPER INSTRUCTION.**—An instruction that one aiding, assisting, and encouraging another in committing a criminal act is guilty equally with the perpetrator, and that to justify conviction it must be shown he aided, assisted, and abetted therein, is a correct statement of the law of accessories, declared in sections 81 and 971 of the Penal Code, the word "abetted" including knowl-



## CRIMINAL LAW (Continued).

- edge of the wrongful purpose of the perpetrator and counsel and encouragement in the crime. (Id.)
17. **INSTRUCTION—ACCESSORIES.**—Where in a prosecution for murder two others were charged with the defendant with the commission of the homicide, and the district attorney in his argument to the jury declared that under the evidence they were justified in finding defendant guilty, although they might find that he did not himself actually do the killing, it was necessary for the court to read to the jury an instruction embracing the principle declared in sections 31 and 971 of the Penal Code, as to accessories in crime. (Id.)
  18. **MOTIVE FOR CRIME—EXISTENCE OF "TONG WAR" AMONG CHINESE—ARGUMENT OF DISTRICT ATTORNEY—EVIDENCE—LACK OF PREJUDICE.** Where in a prosecution of a Chinaman for murder, the evidence was sufficient to warrant a conviction, without showing motive, the argument of the district attorney declaring the existence of a "tong war" and that the homicide resulted from it was harmless. (Id.)
  19. **MOTIVE—WHEN IMMATERIAL.**—While proof of motive is important in a case wholly dependent for its establishment upon circumstantial evidence, yet where the crime is established by direct evidence, proof of motive is entirely unimportant. (Id.)
  20. **COMMISSION OF LEWD ACT—EVIDENCE—EXPLANATIONS OF DEFENDANT—QUESTION FOR JURY—APPEAL.**—In a prosecution for the commission of a lewd act upon the person of a child, the truth or falsity of explanations made by defendant as to his situation and conduct is for the determination of the jury, and its functions cannot be usurped on appeal. (*People v. Swensen*, 262.)
  21. **ASSAULT WITH DEADLY WEAPON—POINTING OF UNLOADED GUN ACCOMPANIED BY THREAT—INSUFFICIENCY TO SUSTAIN CONVICTION.** In a prosecution for the crime of assault with a deadly weapon, the pointing of an unloaded gun at the prosecuting witness, accompanied by a threat, without any attempt to use it otherwise, is not an assault with a deadly weapon, and cannot sustain a conviction for an assault for want of present ability to commit a violent injury on the person threatened in the manner attempted. (*People v. Bennett*, 324.)
  22. **MURDER—DEFAMATION OF FAMILY OF DECEASED—EVIDENCE—REBUTTAL OF TESTIMONY OF DEFENDANT—IMPROPER ADVANCES TO WIFE OF DECEASED.**—In a prosecution for the crime of murder, it was not error to permit the wife of the deceased to testify that the defendant had made improper advances to her several months previous to the homicide, where the purpose of such evidence was to rebut the testimony of the defendant that he had never defamed the family of the deceased or had ever done anything to him as a traitor. (*People v. Soldavini*, 331.)
  23. **LARCENY—CUSTODIAN OF PROPERTY.**—A person not hired for a servant, but for a caretaker, whose principal duty was to see that no

**CRIMINAL LAW (Continued).**

- one took anything out of the house of his employer, is guilty of larceny, and not of embezzlement, in feloniously taking personal property from the house. (*People v. Kawanakoa*, 433.)
24. **MAILING OF FORGED CHECK—COLLECTION IN ANOTHER STATE—CRIME PARTLY COMMITTED IN THIS STATE.**—Under section 27 of the Penal Code, which provides that all persons who commit, in whole or in part, any crime within this state, are liable to punishment under the laws of this state, a person who mailed a forged check in a foreign country to a bank in this state with instructions to such bank to mail the check for collection to a bank in another state is guilty of a crime committed in part within this state, and is liable to punishment therefor. (*People v. Sansom*, 435.)
25. **RELEASE WITHOUT BAIL.**—Under the procedure generally applicable in criminal actions a defendant is not entitled to be released without bail upon his mere promise to appear for trial, nor will such release ordinarily be permitted by an arresting officer until it is so ordered by the court or magistrate. (*In re Turck*, 601.)
26. **VIOLATION OF VEHICLE ACT—VALIDITY OF JUDGMENT OF CONVICTION.**—A judgment of conviction for a violation of section 22 of the Vehicle Act (Stats. 1917, p. 404) is not void on its face merely because it does not affirmatively declare that the defendant upon his appearance before the justice of the peace on the day of his arrest waived his right to the five days' time provided by subdivision (c) of said section, and does not affirmatively set forth that such justice was the most accessible magistrate. (*Id.*)
27. **RIGHTS UNDER VEHICLE ACT—DENIAL BY JUSTICE'S COURT—REMEDY BY APPEAL—HABEAS CORPUS.**—The rights given to persons arrested for speeding under section 22 of the Vehicle Act may be waived, and their denial by the justice's court is mere error, correctible on appeal, but not reviewable under *habeas corpus*. (*Id.*)
28. **VOID SENTENCE—INDETERMINATE TERM—PRONOUNCEMENT OF SECOND SENTENCE—POWER OF COURT.**—A judgment in a criminal case sentencing the defendant for an indefinite term upon conviction of a crime committed prior to the enactment of the indeterminate sentence law is void, and the court has jurisdiction to pronounce a second sentence for a fixed term of imprisonment. (*People v. Booth*, 650.)
29. **MURDER—EVIDENCE—HARMLESS ERROR.**—In this prosecution for murder, it is held there is nothing in any of the rulings on testimony which, even assuming some to have been erroneous, could have unduly prejudiced the rights of the defendant. (*People v. Lee Sing Park*, 652.)
30. **VERDICT—SUFFICIENCY OF EVIDENCE.**—It is also held that the evidence was sufficient to support the verdict. (*Id.*)
31. **ASSAULT WITH DEADLY WEAPON WITH INTENT TO MURDER—VERDICT SUPPORTED BY EVIDENCE.**—In this prosecution for an assault

## CRIMINAL LAW (Continued).

- with a deadly weapon with intent to commit murder, it is held the evidence clearly shows the guilt of the accused, the record shows no errors in rulings on testimony or in the giving of instructions. (*People v. Jacinto*, 655.)
32. **INDETERMINATE SENTENCE—CRIME COMMITTED PRIOR TO ENACTMENT.** An indeterminate sentence for a crime committed prior to the adoption of section 1168 of the Penal Code, relating to indeterminate sentences, is improper. (*People v. Pope*, 656.)
33. **RAPE—VERDICT SUPPORTED BY EVIDENCE.**—In this prosecution for the crime of rape, it is held the verdict is supported by the evidence and that no prejudicial rulings appear. (*Id.*)
34. **APPEAL—SUPPORT OF VERDICT—PRESUMPTION.**—On appeal from a judgment and order denying a new trial in a criminal case, the presumption is that no prejudicial error was committed and that the verdict is amply supported. (*People v. Pimentel*, 682.)
35. **ROBBERY—VERDICT SUPPORTED BY EVIDENCE.**—In this prosecution for robbery, it is held that the verdict is supported by the evidence. (*Id.*)
36. **RECORD—AFFIRMANCE OF JUDGMENT.**—Where there has been no appearance for the appellant, and an examination of the record shows that he has been fairly tried and justly convicted, the judgment will be affirmed. (*People v. Flacco*, 683.)
37. **COMMISSION OF LEWD ACT UPON CHILD—VERDICT WARRANTED BY EVIDENCE.**—In this prosecution for committing lewd and lascivious acts upon and with the body of a female child under the age of fourteen years, it is held that there was sufficient evidence to warrant a verdict that the defendant was guilty of the offense charged, and not of an attempt to commit rape. (*People v. Rossi*, 778.)
38. **ARGUMENT OF DISTRICT ATTORNEY—REFERENCE TO DEFENDANT AS "DEBAUCHER"—CONDUCT WITHOUT PREJUDICE.**—In such a prosecution, reference by the district attorney in his argument to the case as one in which the "little girl" had been "debauched" by the defendant and also declaring that the defendant was a "debaucher" is not misconduct. (*Id.*)
39. **SENTENCE FIXING MAXIMUM TERM OF IMPRISONMENT—CRIME COMMITTED SUBSEQUENT TO INDETERMINATE SENTENCE LAW—UNAUTHORIZED SENTENCE.**—The provisions of section 1168 of the Penal Code relating to indeterminate sentences are applicable to offenses committed subsequent to the enactment, and a sentence fixing the maximum term of imprisonment at twenty years for a violation of section 288 of such code is unwarranted. (*Id.*)
40. **COMMISSION OF LEWD ACTS UPON CHILD—ACCUSATORY STATEMENTS OF WIFE OF DEFENDANT—FAILURE TO MAKE REPLY—ERRONEOUS ADMISSION IN EVIDENCE.**—In a prosecution for the of-

**CRIMINAL LAW (Continued).**

fense defined in section 288 of the Penal Code, the admission in evidence, over defendant's objection, of the testimony of an officer as to what transpired on the occasion of a visit made by defendant to his home was error where such testimony was to the effect that the defendant's wife told the defendant that he had "been warned about this thing before" and that she did "not believe in this thing of ruining young girls," and the defendant made no reply thereto other than saying that "this is not any place to discuss that." (*People v. Hartwell*, 799.)

41. **SILENCE OF ACCUSED IN PRESENCE OF ACCUSATIONS—RULE AS TO ADMISSIBILITY.**—Statements of third parties made to or in the presence of one charged with the commission of a crime and tending to connect him therewith are admitted, not as of themselves constituting evidence of the facts stated, but to show what it is that calls for a reply; and where the statement is such that under the circumstances the accused, if innocent, should repudiate it, his remaining mute will constitute evidence of his admission of the truth of the statement made. (*Id.*)
42. **WARNING OF ACCUSED — ADMISSION — INSUFFICIENT EVIDENCE OF LASCIVIOUS NATURE.**—In such a prosecution, admissions of the accused that he had been warned is not, in the absence of evidence showing reason or occasion therefor, evidence tending to prove that defendant was of a lascivious nature, or that he had theretofore indulged in such acts. (*Id.*)
43. **ERRONEOUS ADMISSIONS OF ACCUSATORY STATEMENTS—ARGUMENT OF DISTRICT ATTORNEY—PREJUDICIAL ERROR.**—In such a prosecution, the erroneous admission of accusatory statements of the wife of the defendant was prejudicial where the district attorney laid great stress on the statements in his argument. (*Id.*)
44. **COMMISSION OF LEWD ACTS—IDENTITY OF DEFENDANT—SUFFICIENCY OF EVIDENCE.**—In this prosecution for lascivious conduct with an eight year old girl in violation of section 288 of the Penal Code, it is held the evidence is sufficient to warrant the conclusion that the defendant was the perpetrator. (*People v. Delgado*, 807.)
45. **PLACING OF HAND ON PRIVATE ORGANS—GIRL NOT AN ACCOMPLICE.** In a prosecution for the commission of lewd acts, where the defendant was charged with placing the hand of a girl of the age of eight years upon his private organs, the girl was not, in view of the amendment of 1915 to section 1111 of the Penal Code, an accomplice, being, if anything, a mere passive instrument. (*Id.*)
46. **EVIDENCE—SUBSEQUENT ACTS.**—In such a prosecution, evidence of what occurred two weeks subsequent to the date charged, when the defendant was trapped and arrested, is admissible. (*Id.*)
47. **EXPERT TESTIMONY — EFFECT OF PLACING HAND UPON PRIVATE ORGANS—HARMLESS ERROR.**—In such a prosecution the admission

**CRIMINAL LAW (Continued).**

of expert testimony to prove that the placing of a girl's hand upon a man's private organs would tend to excite his passion and to a certain extent gratify his desires is error without prejudice where the jury under the evidence could not well have concluded that the acts charged were other than those denounced by the statute. (Id.)

48. **NEW TRIAL—NEWLY DISCOVERED EVIDENCE—LACK OF DILIGENCE.**—In such a prosecution it is not error to deny a motion for a new trial on the ground of newly discovered evidence, where the evidence was such as could have been procured with reasonable diligence at the trial. (Id.)

See Forgery; Contempt, 4; Extradition, 1-3; Intoxicating Liquors, 1; Parent and Child, 2.

**DAMAGES.** See Attachment, 2; Claim and Delivery, 1; Contracts, 12, 27, 28; Judgments, 21; Negligence, 11, 28; Street Law, 13, 14; Unlawful Detainer, 4, 5, 7, 8.

**DEED OF TRUST.** See Contracts, 35.

**DEEDS.**

1. **BOUNDARY—CONSTRUCTION OF DEED BY PARTIES—CONSIDERATION BY COURT.**—In determining the location for a boundary line, the construction placed upon a description in a deed, as shown by the acts and conduct of the grantor and his grantees for a long period of time with relation to the line, is entitled to the gravest consideration, unless the terms of the deed are clear and certain to the contrary. (Williamson v. Pratt, 363.)
2. **ROAD AS BOUNDARY—PAROL EVIDENCE.**—In an action in ejectment to determine a boundary line, where a deed gave a road as a boundary, but it was not clear what road was intended, it was proper to show by parol evidence the identity of the road. (Id.)
3. **MONUMENTS CONTROLLING OVER COURSES.**—When monuments mentioned in a deed are identified, they control both courses and distances given, whether they were seen by the parties to the deed or not. (Id.)
4. **FIXING OF LINE BY AGREEMENT—ESTOPPEL.**—Where the boundary line between the lands of contiguous owners is doubtful or uncertain and they by parol agreement fix and determine a dividing line between their respective tracts, said line being marked by the erection or maintenance of a fence or other equivalent structure along it, and thereafter the parties hold and occupy their respective lands to the boundary as so agreed on, the accuracy of such boundary line cannot be subsequently questioned by the parties establishing it, or by those claiming under either of them. (Id.)
5. **DELIVERY TO NOTARY PUBLIC—RESERVATION OF CONTROL—TITLE NOT DIVESTED.**—Where a grantor delivered a deed to a notary public

**DEEDS (Continued).**

with instructions to keep the deed until the grantor called for it, or until the death of the grantor, and in the latter event to hand it to the father of the grantees, there was no delivery sufficient to pass title. (*Heitman v. Bruns*, 489.)

6. **ACTION TO SET ASIDE DEED—LACK OF DELIVERY—WANT OF CONSIDERATION—FINDINGS SUPPORTED BY EVIDENCE.**—In this action by an administrator to set aside a deed made by his deceased wife, it is held the findings of nondelivery of the deed, lack of consideration, and that the wife was the owner of the property at the time of her death, were supported by the evidence. (*Id.*)
7. **CHANGE OF NAME OF GRANTEE—CONSENT OF GRANTOR.**—A deed is not void by reason of the substitution therein after its signing and acknowledgment, but before its delivery, of the name of a different grantee, where such substitution is made with the consent of the grantor. (*Dutton v. Locke-Paddon*, 693.)

**DEFAULT.** See Judgments, 1, 3.

**DEFENSE.** See Judgments, 12, 13; Negligence, 37.

**DELIVERY.** See Deeds, 5; Promissory Notes, 9.

**DEMAND.** See Brokers, 7; Leases, 3.

**DESCRIPTION.** See Condemnation of Land, 1, 2; Contracts, 39; Deeds, 1, 2; Easements, 1; Street Law, 17.

**DILIGENCE.** See Sales, 3.

**DISBARMENT.** See Attorney at Law, 1-4.

**DISCRETION.** See Judgments, 8.

**DISMISSAL.**

**FAILURE TO BRING TO TRIAL WITHIN FIVE YEARS MANDATORY PROVISION.**—The provision of section 583 of the Code of Civil Procedure as to the dismissal of actions not brought to trial within five years after the filing of the answer is mandatory, and the circumstances that the trial was postponed several times without plaintiff's consent, one of those occasions being a relatively short time before the date when the defendant would be entitled to require the court to dismiss the action, is a matter of no significance. (*Ravn v. Planz*, 735.)

See Red-light Abatement Act, 1.

## DIVORCE.

1. **ALIMONY — MODIFICATION OF DECREE — CHANGED CIRCUMSTANCES.**—An order modifying an interlocutory decree of divorce in respect to allowance of alimony will not be disturbed on appeal where it was shown that the wife had acquired an interest in improved real property from which she derived an income. (*Matthews v. Matthews*, 259.)
2. **AGREEMENT AS TO AMOUNT—CONFLICT OF EVIDENCE—APPEAL.**—An order modifying an interlocutory decree of divorce in respect to allowance of alimony will not be disturbed on appeal where the evidence as to the existence of an alleged agreement relating to the amount was conflicting. (*Id.*)  
See *Contracts*, 25; *Parent and Child*, 1.

## EASEMENTS.

1. **INJUNCTION — TRESPASS UPON TIDE-LAND LOTS — CROSS-COMPLAINT ASSERTING EASEMENT—DESCRIPTION OF PROPERTY—SUFFICIENCY OF CROSS-COMPLAINT.**—In an action to enjoin the defendants from trespassing upon tide-land lots, wherein they by cross-complaint sought to subject the lots to a private easement for a right of way for a wharf, the cross-pleading sufficiently describes the property by referring to it as "Ackerman's Cove," and alleging that the same is the property described in the plaintiff's complaint, the easement not being directed to any part of the lands, but affecting the entire tract. (*Connell v. McGahie*, 439.)
2. **PUBLIC AND PRIVATE EASEMENT IN SAME WATERS — CROSS-COMPLAINT NOT INCONSISTENT.**—In such an action, there is no fatal contradiction in alleging in the cross-complaint a public easement for the use of alleged navigable waters and a private easement consisting in part of the same use of the identical waters, since they are based upon separate and distinct rights. (*Id.*)
3. **ENFORCEMENT OF RIGHTS—RIGHT OF LESSEE OF EASEMENT.**—A lessee of a right of way for a wharf has the right to file a cross-complaint asserting his rights under the easement. (*Id.*)

## EJECTMENT.

1. **PLEADING—ENFORCEMENT OF TRUST—CONCURRENT MAINTENANCE OF ACTIONS.**—An action in ejectment and an action to enforce an alleged trust as to the same parcel of land may be maintained concurrently. (*Bradley Co. v. Bradley*, 270.)
2. **CROSS-COMPLAINT QUIETING TITLE — VERDICT ON ISSUES RAISED—FAILURE TO ADOPT — UNSUPPORTED JUDGMENT.**—In an action in ejectment to recover two parcels of land, in which the defendant filed a cross-complaint to quiet title to one of such parcels, a judgment quieting such title cannot be sustained where the cause was tried by a jury and the court did not adopt the verdict or make

**EJECTMENT (Continued).**

findings in conformity therewith, although the parties stipulated that the fate of the issues raised by the cross-complaint should be governed by the verdict. (Id.)

3. **EQUITY CASE—ADOPTION OF VERDICT—DUTY OF COURT.**—In an equity case, or on an equitable issue, the verdict of the jury must be expressly adopted by the court in some unmistakable manner, and findings made by it in conformity to such verdict or in rejection of it, or else the judgment will be reversed as having nothing to support it in such a case or on such an issue. (Id.)
4. **JUDGMENT—QUIETING TITLE TO TWO PARCELS OF LAND—SCOPE OF CROSS-COMPLAINT.**—In an action in ejectment to recover two parcels of land, a judgment in favor of defendant quieting title to both parcels upon a cross-complaint which sought to have the title quieted as to one parcel only is unwarranted. (Id.)

**ELECTRIC LIGHTING.** See Street Law, 7, 9, 10.

**EMPLOYER AND EMPLOYEE.**

**SAFE PLACE TO WORK—MEANING OF TERM.**—The word “safe” as used in connection with the duty of employers to furnish a reasonably safe place to work does not mean a place so made and guarded that it precludes all possibility of danger, but the word is a relative one, and the safety of the place is to be judged by the nature of the work. (Valentine v. Hayes, 42.)

See Municipal Corporations, 6, 7; Wages, 1-3; Workmen's Compensation Act, 2, 3.

**EQUITY.** See Ejectment, 3; Judgments, 11; Trusts, 13.

**ESTATES OF DECEASED PERSONS.** See Trusts, 5, 6.

**ESTOPPEL.** See Brokers, 5; Contracts, 26, 29; Husband and Wife, 2; Judgments, 19; Street Law, 23; Transfer, 1-3.

**EVIDENCE.**

1. **REJECTION OF TESTIMONY—RIGHT OF COURT.**—While it is true that a judge or jury have no right to arbitrarily reject testimony, this may be done when it does not produce conviction. (Heitman v. Bruns, 489.)
2. **NUMBER OF WITNESSES—INSTRUCTION—RULE APPLICABLE TO JUDGE AND JURY.**—The rule laid down in subdivision 2 of section 2061 of the Code of Civil Procedure that jurors are to be instructed that they are not to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their



**EVIDENCE (Continued).**

minds, as against a presumption of other evidence satisfying their minds, applies alike to judge and jury. (*Id.*)

3. **CONTRADICTION OF WITNESS BY FACTS.**—A witness may be contradicted by the facts he states as completely as by direct adverse testimony. (*Id.*)
4. **ATTORNEY AND CLIENT — PRIVILEGED COMMUNICATIONS — WAIVER.**—Where a client voluntarily testifies as a witness to confidential communications made by him to his attorney, he thereby waives the privileged character of such communications, and both he and his attorney may then be fully examined in relation thereto. (*Rose v. Crawford*, 664.)

See Appeal, 15; Brokers, 6; Condemnation of Land, 3, 7-12; Contempt, 3; Contracts, 23, 35, 36, 39; Criminal Law, 13, 14, 19, 22, 29, 30, 37, 40-44, 46, 47; Deeds, 2, 6; Highways, 3; Husband and Wife, 1; Intoxicating Liquors, 4, 5; Judgments, 20; Leases, 2, 12; Negligence, 3, 5, 6, 8, 10, 22, 24, 29, 32, 44, 56; Promissory Notes, 2-4, 6; Reclamation Districts, 1; Red-light Abatement Act, 2, 3; Sales, 1, 4, 12, 13; Trusts, 7-10, 15, 16, 18; Vendors' Liens, 4; Waters and Water Rights, 1.

**EXECUTION.**

1. **LIFE INSURANCE—EXEMPTION.**—All moneys, benefits, privileges, or immunities accruing or in any manner growing out of any life insurance, if the annual premiums paid do not exceed five hundred dollars, are exempt from execution. (*Hing v. Lee*, 313.)
2. **EXEMPT PROPERTY — DELAY IN MAKING CLAIM—WAIVER.**—Where personal property is levied on under an execution, a delay of the alleged owner to claim exemption after one month's notice of the seizure constitutes a waiver of the claim for exemption. (*Id.*)

**EXECUTION SALES.**

**MOTION TO SET ASIDE EXECUTION SALE—CHARGES OF CONSPIRACY TO DEFAUD NOT ENTERTAINABLE.**—On a motion to set aside an execution sale, allegations of conspiracy to commit a fraud on the rights of the judgment debtor cannot be considered. (*Craig v. Stansbury*, 668.)

See Supersedeas, 2, 3.

**EXEMPTIONS.** See Execution, 1, 2.**EXTRADITION.**

1. **DUTY OF GOVERNOR.**—Where a person is properly charged with the commission of a crime under the laws of another state while within its jurisdiction, after which he departs from such state and is found within this state, it is the duty of the Governor, upon the

**EXTRADITION (Continued).**

presentation of proper documents, to honor the requisition made by the Governor of such state, and neither the executive nor the courts of this state have the right to inquire into the question of his guilt or innocence. (In re Thurber, 571.)

2. **FUGITIVE FROM JUSTICE.**—The expression "fugitive from justice," as used in the Revised Statutes, section 5278, regulating the extradition of fugitives from justice, has reference to a person who, having within the state committed that which by its law constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, has left its jurisdiction and is found in the territory of another state. (Id.)
3. **HABEAS CORPUS—SCOPE OF INQUIRY.**—On *habeas corpus* by one arrested on an extradition warrant, inquiry may only be made into the question of fact as to whether the accused was within the territory of the other state when the alleged offense was committed. (Id.)

**FEES.** See Appeal, 22.

**FIDUCIARY RELATIONS.** See Trusts, 19, 20.

**FINDINGS.** See Appeal, 11; Costs, 1; Ejectment, 3; Judgments, 21; Sales, 11; Services, 1; Waters and Water Rights, 3, 4.

**FORFEITURES.** See Contracts, 26.

**FORGERY.** See Banks, 1, 2.

**FRAUD.** See Execution Sales, 1; Promissory Notes, 5, 6; Trusts, 17.

**FRAUDULENT CONVEYANCES.**

1. **SALE OF PERSONAL PROPERTY—CHANGE OF POSSESSION.**—Under section 3440 of the Civil Code, requiring a change of possession on the transfer of personal property, a sale, to be good against the creditors of the vendor, must be accompanied by an actual and continued change of possession, and this means not a mere formal change, but that the possession of the vendee must be open and unequivocal, carrying with it the usual marks and indications of ownership, and it must be such as to give notice to the world of the claims of the new owner, and must be continuous. (Boot v. Boyd, 545.)
2. **SALE OF REAL AND PERSONAL PROPERTY—TAKING POSSESSION OF REAL PROPERTY—INSUFFICIENT EVIDENCE OF CHANGE OF POSSESSION OF PERSONAL PROPERTY.**—Where real property is sold and a bill of sale for personal property located thereon is at the same time given to the vendee, the fact that the vendee took possession of the

**FRAUDULENT CONVEYANCES (Continued).**

real property is not sufficient evidence of a change of possession of the personal property. (Id.)

3. **CONTINUATION OF POSSESSION BY SELLER—SUSPICIOUS CIRCUMSTANCE.**—The fact that a buyer of personal property went upon the land where it was located and checked it off, thus exercising an act of ownership, is only a circumstance in determining whether there was a delivery and change of possession, and the continuous possession by the vendor constituted a suspicious circumstance. (Id.)

**FUGITIVE FROM JUSTICE.** See Extradition, 2.

**GARNISHMENT.** See Mechanics' Liens, 7; Trusts, 24.

**GIFTS.** See Trusts, 3, 4, 11.

**GUARANTY.** See Sales, 1.

**HABEAS CORPUS.** See Criminal Law, 27; Extradition, 2.

**HIGHWAYS.**

1. **ABANDONMENT—RIGHT OF BOARD OF SUPERVISORS.**—In view of the provisions of subdivision 3 of section 2643 of the Political Code, a board of supervisors may, of its own motion and without any petition therefor, order a public road abandoned. (Firth v. Bohrmann, 803.)
2. **PETITION FOR ABANDONMENT—GENUINENESS OF SIGNATURES—QUALIFICATION OF SIGNERS—JURISDICTION OF BOARD OF SUPERVISORS.**—On proceedings for the abandonment of a public road, the genuineness of the signatures and qualifications of the signers of the petition for the abandonment are questions to be determined by the board of supervisors, and in making such determination the board acts judicially. (Id.)
3. **FINDINGS OF BOARD—SUFFICIENCY OF EVIDENCE—PRESUMPTION ON COLLATERAL ATTACK.**—Where a hearing to abandon a public road is regularly had upon a petition sufficient in both form and substance, it will be presumed on collateral attack that the evidence was ample to establish the truth of the board's findings as to the genuineness of the signatures and the qualification of the signers of the petition. (Id.)
4. **ABANDONMENT OF ROAD—PROCEEDINGS NOT SUBJECT TO COLLATERAL ATTACK.**—The action of a board of supervisors abandoning a public road at a hearing regularly had upon a sufficient petition cannot be collaterally attacked because of error in adjudication of a question of fact, not procured by fraud extrinsic or collateral to such question. (Id.)

**HOSPITALS.** See Negligence, 33.

**HUSBAND AND WIFE.**

**1. PROPERTY ACQUIRED IN WIFE'S NAME—PRESUMPTION—EVIDENCE.—**

The presumption that property acquired in the name of the wife is her separate property is not conclusive, and where the question of ownership is involved, the court is entitled to receive and consider any competent evidence which tends to disclose the manner of acquisition of the property, and from the acts and conduct of the husband determine whether the transaction whereby the property was conveyed to her constituted a gift. (*Cohn v. Smith*, 764.)

**2. ACTION ON BUILDING BOND—HUSBAND'S OWNERSHIP—ESTOPPEL.—**

In an action on a building contractor's bond, where it is shown that the contract for the erection of the building was entered into with the husband as owner, although the record title was in the name of the wife, and he as owner expended his money for the building, the obligors named in the bond are estopped from denying the husband's ownership, since as to them he should conclusively be presumed to be the real party in interest. (*Id.*)

See Appeal, 23; Contracts, 25; Parties, 1.

**INCOMPETENT PERSONS.** See Transfer, 1.

**INDEMNITY.** See Insurance, 1.

**INDEPENDENT CONTRACTOR.** See Workmen's Compensation Act, 3, 4.

**INFERENCES.** See Negligence, 10, 24.

**INJUNCTION.** See Contempt, 2, 3, 5; Contracts, 9, 10; Red-light Abatement Act, 4.

**INSTRUCTIONS.** See Condemnation of Land, 12; Criminal Law, 15-17; Evidence, 2; Intoxicating Liquors, 3; Negligence, 1, 4, 7-9, 45, 46, 56.

**INSURANCE.**

**1. DEFENSE OF SUITS COVERED BY POLICY—DUTY OF INSURER.—**

Where an indemnity policy provided that the insurer was to defend any suit against the insured to enforce a claim for damages covered by the policy, whether groundless or not, the insurer was required to defend every action in which the complaint showed a claim for damages covered by the policy, notwithstanding the suit was groundless and defeated, and where the insurer failed to defend, it was liable to the insured for the costs and expenses of the defense. (*Greer-Robbins Co. v. Pacific Surety Co.*, 541.)

---

**INSURANCE (Continued).**

2. **ACTION ON POLICY—RECOVERY OF COSTS AND EXPENSES OF DEFENDING ACTION—SUFFICIENCY OF COMPLAINT IN LIABILITY ACTION—APPEAL—RECORD—PRESUMPTION.**—In an action on such a policy to recover costs and expenses of defending an action which the insurer failed to defend, where the record on appeal taken by the insurer failed to show whether the complaint disclosed that the complaint in the other action stated a cause of action, the appellate court is bound to assume in support of the judgment that such a showing was made. (Id.)

See Accident Insurance; Life Insurance.

**INTENT.** See Intoxicating Liquors, 2, 3.

**INTEREST.** See Accounts, 1; Brokers, 7; Claim and Delivery, 1, 2; Promissory Notes, 7; Reclamation Districts, 3.

**INTOXICATING LIQUORS.**

1. **PURCHASE BY CLUB—SALE TO MEMBERS—VIOLATION OF WYLLIE ACT.**  
Under section 14 of the Wyllie local option law, prohibiting the keeping of a place within no license territory where alcoholic liquor is sold, served, or distributed, a club and its chairman of house committee and steward, as its agents, are guilty of a violation of the act, where the members of the club, which was located in no-license territory, desiring liquor, notified the steward, who ordered it from a wholesale liquor house, and the liquor was shipped to and charged to the club, and upon its arrival distributed among the members and payment therefor collected by the club, the liquor being kept either in a locker used in common, or placed indiscriminately with that of others in a refrigerator until served by the steward. (People v. Tinney, 811.)
2. **PROSECUTION FOR SALE IN NO-LICENSE TERRITORY—TRIAL—REFUSAL OF CONTINUANCE WITHOUT ERROR.**—In a prosecution for selling alcoholic liquor in no-license territory, the refusal to grant a continuance for the purpose of giving the defendant an opportunity to produce a witness who would testify that he prepared at defendant's request a bottle of liquid resembling whisky but containing less than the inhibited quantity of alcohol, for sale for the purpose of playing a joke upon her, was not error, since such evidence was addressed to the intent of the defendant, which was immaterial. (People v. Allen, 180.)
3. **IMPLIED INTENT TO VIOLATE LAW—INSTRUCTION.**—In a prosecution for selling liquor in no-license territory, where there is proof beyond a reasonable doubt that the defendant sold the liquor, an instruction that in such a case the intent to violate the law is implied, is a correct statement. (Id.)

**INTOXICATING LIQUORS (Continued).**

4. **EVIDENCE—MEMORANDA.**—While under section 2047 of the Code of Civil Procedure a witness may refresh his memory respecting a fact by anything written by himself, or under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, such section does not authorize the introduction in evidence of memoranda in corroboration of what a witness had testified to without resort to the memoranda. (Id.)
5. **CHARACTER OF LIQUOR SOLD—EXPERT TESTIMONY UNNECESSARY.**—In a prosecution for the sale of alcoholic liquor in no-license territory, testimony of a person not an expert, familiar with the taste of whisky, that the liquid sold was whisky, is admissible, since the drinking of whisky is of such common occurrence that it does not require an expert to pronounce upon it. (Id.)

**JOINDER.** See Pleading, 4, 5.

**JUDGMENTS.**

1. **ORDER VACATING—APPEAL—ATTITUDE OF APPELLATE COURT.**—Appellate courts are strongly inclined to uphold an order vacating a default judgment on the ground of mistake and excusable neglect if there be found in the record any legal justification for the action of the trial court. (*Penryn Land Co. v. Akahori*, 14.)
2. **INNOCENT PURCHASER—NECESSITY FOR SUBSTANTIAL EVIDENCE.**—When, however, the orderly processes of law have been followed, and a judgment regularly obtained, there must be some substantial evidence received to excuse in a legal sense the inaction of the defendant before the court will be justified in setting at naught its prior determination, especially where an innocent purchaser relying upon the validity of the judgment has acquired the property for a valuable consideration. (Id.)
3. **ACTION AGAINST ADMINISTRATOR—FAILURE TO READ PROCESS—DELIVERY TO ATTORNEY FOR ESTATE—VACATION OF DEFAULT UNWARRANTED.**—Where an administrator was served with a copy of the complaint and summons in an action to quiet title to property of his intestate, and, being very busy, merely glanced at the paper without reading it, and seeing that it pertained to the estate, left it on the desk of the attorney, there was no excusable neglect or mistake on the part of the administrator to justify the vacation of the default judgment taken against him. (Id.)
4. **FAILURE TO EXPLAIN DEFENSE TO ATTORNEY—ERRONEOUS CONCLUSION OF ATTORNEY AS TO DEFENSE—INSUFFICIENT LEGAL JUSTIFICATION FOR VACATING DEFAULT.**—In an action brought against an administrator to quiet title to property of his intestate, the order vacating the default judgment entered therein against such administrator, on the ground of his mistake and excusable neglect, is without

---

JUDGMENTS (Continued).

legal justification, where the copy of the complaint and summons served upon defendant was not read by him, but placed in the hands of the attorney for the estate, and without any explanation of the defense, and the attorney concluded that no valid defense existed. (Id.)

5. **MISTAKEN JUDGMENT OF ATTORNEY—USELESSNESS TO DEFEND ACTION—INSUFFICIENT GROUND FOR RELIEF.**—Mistake on the part of an attorney in concluding that it was useless to make a defense to the action is not the kind of a mistake for which a judgment may be set aside, although it might be the basis for an independent action for damages against the attorney. (Id.)
6. **MOTION TO VACATE—TIME.**—Where the defendants appeared in court and formally made their motion to set aside the judgment within six months after its rendition, as required by section 473 of the Code of Civil Procedure, the fact that after reading the motion the further consideration thereof was postponed until after the expiration of such statutory period did not divest the court of jurisdiction to grant relief. (*Kelsey Co. v. Spears*, 27.)
7. **ORDER TO SHOW CAUSE—WHEN IMMATERIAL.**—Where the adverse party made his appearance in court at the time fixed for hearing the motion to set aside the judgment and had an opportunity to do all that he could do under any circumstances, the fact that a formal order to show cause was not made was immaterial. (Id.)
8. **COMPROMISE JUDGMENT—ORDER SETTING ASIDE—DISCRETION NOT ABUSED.**—Where the defendants in an action concerning water rights agreed to a compromise judgment and authorized their attorney to prepare a judgment according to the terms and conditions of the compromise, but upon the understanding that the judgment was to be submitted to them for their approval before it should be entered, and the judgment was entered without such submission, and they did not understand or appreciate the effect or significance of such judgment as explained to them by their attorney, it was not an abuse of discretion to set the judgment aside. (Id.)
9. **MORTGAGE—ACTION FOR FORECLOSURE—DEFICIENCY JUDGMENT—LIMITATION TO DEFENDANTS PERSONALLY LIABLE FOR DEBT.**—In an action for the foreclosure of a mortgage, the deficiency judgment contemplated by section 726 of the Code of Civil Procedure can only be docketed by the clerk against the defendant or defendants personally liable for the debt. (*Ewing v. Richvale Land Co.*, 53.)
10. **SUFFICIENCY OF JUDGMENT—EXPRESS RECITAL OF PERSONAL LIABILITY UNNECESSARY.**—In an action for the foreclosure of a mortgage it is not necessary that the judgment should in express terms state that the defendant is personally liable for the debt in order to warrant the docketing of a deficiency judgment against him, if such fact clearly appears from the findings and judgment; and a

**JUDGMENTS (Continued).**

judgment against defendant in a named sum is equivalent to a judgment that defendant is personally liable for the amount found due and to authorize the entry of a deficiency judgment against him. (Id.)

11. **SETTING ASIDE.**—Equity will not overturn a judgment valid on its face, unless it is against conscience, and it appears that a like judgment would not follow in the same action or upon the same cause of action. (*Molloy v. Pierson*, 486.)
12. **MERITORIOUS DEFENSE.**—In an action to set aside a default judgment, the defendant must establish a good defense on the merits to the complaint upon which the judgment is based. (Id.)
13. **REFORMATION OF LEASE—DEFAULT JUDGMENT BASED UPON THREE-DAY SUMMONS NOT VOID.**—A default judgment in an action in unlawful detainer predicated on a three-day summons is not void because a reformation of the lease was also asked in the complaint, since the court had the right to construe the lease to determine its true meaning, reformation being immaterial. (*Zucco v. Farullo*, 562.)
14. **EFFECT OF DEFAULT JUDGMENT.**—A default judgment in an action in unlawful detainer, entered without findings, must be taken to have established all the facts aptly pleaded in the complaint. (Id.)
15. **MOTION TO VACATE—TIME.**—A judgment rendered on a demurrable complaint, but within the relief demanded, is erroneous, but not void, and cannot be set aside on motion made under section 473 of the Code of Civil Procedure after the time for appeal and the time for making such motion has expired. (*Spaulding & Co. v. Chopin*, 573.)
16. **SERVICE OF NOTICE OF OVERRULING DEMURRER—ERRONEOUS AFFIDAVIT—JUDGMENT NOT VOID ON FACE.**—A judgment is not void on its face and subject to be set aside on motion after the time allowed by section 473 of the Code of Civil Procedure, because the affidavit of service of notice of overruling of the demurrer to the complaint erroneously showed service to have been made on attorneys not representing the defendant, where the service in fact was made on proper counsel. (Id.)
17. **JUDGMENT—WHEN VOID ON FACE.**—A judgment is void on its face when that matter is made apparent by an inspection of the judgment-roll. (Id.)
18. **DEFECTIVE AFFIDAVIT OF SERVICE—JUDGMENT NOT VOID ON FACE.**—Inasmuch as proof of service of notice of decision on demurrer does not constitute part of the judgment-roll within section 670 of the Code of Civil Procedure, the fact that the affidavit of service is defective does not make a judgment thereon void on its face. (Id.)
19. **DEFECTIVE NOTICE—ESTOPPEL.**—A defendant who has obtained numerous extensions of time after service of notice of overruling



**JUDGMENTS (Continued).**

demurrer within which to answer is estopped from asserting that the notice was defective. (Id.)

20. **MOTION TO VACATE—AUTHORITY OF ATTORNEY TO STIPULATE AS TO ENTRY—AFFIDAVIT ADMISSIBLE.**—On a motion to vacate a judgment in an action to foreclose the rights of the purchaser under a contract for the sale of real property on the ground that the defendant was not in default under the contract and that her former attorney was wholly without authority to stipulate that judgment should be entered against her, the affidavit of such attorney to the effect that she admitted her default and that the allegations of the complaint were substantially true was properly read at the hearing. (*Rose v. Crawford*, 664.)

21. **CONSTRUCTION OF FINDINGS—SUPPORT OF JUDGMENT.**—Courts may find damages in a lump sum, and any uncertainty in the findings is to be construed so as to support the judgment rather than defeat it. (*Ersine v. Marchant*, 590.)

See Contracts, 25; Criminal Law, 26; Divorce, 1; Leases, 7; Parties, 1; Pleading, 8; Red-light Abatement Act, 4; Services, 1; Waters and Water Rights, 5.

**JURIES AND JURORS.** See Criminal Law, 10.

**JURISDICTION.** See Contempt, 8, 9; Criminal Law, 24; Negligence, 13; Street Law, 24.

**JURY TRIALS.**

1. **FAILURE TO ANNOUNCE DESIRE AT TIME OF SETTING CAUSE—CODE AMENDMENT—IGNORANCE OF COUNSEL—REFUSAL OF RELIEF—DISCRETION NOT ABUSED.**—It is not an abuse of discretion to deny a motion made under section 473 of the Code of Civil Procedure for an order setting aside an assignment of an action for trial to a court without a jury, where such motion was made upon the ground that the defendant had failed to ask for a jury trial in time because of the ignorance of his counsel of the addition of subdivision 4 to section 631 of the Code of Civil Procedure, predicated waiver of right to jury trial on failure to announce such desire at the time when the cause is first set for hearing. (*Bennett v. Hillman*, 586.)
2. **WAIVER OF RIGHT TO JURY TRIAL—FAILURE TO ANNOUNCE DESIRE AT SETTING OF CAUSE—CODE AMENDMENT CONSTITUTIONAL.**—Subdivision 4 of section 631 of the Code of Civil Procedure is not unconstitutional under the language of section 7 of article I of the constitution, to the effect that a trial by jury may be waived in civil actions by the consent of the parties signified in such manner as may be prescribed by law. (Id.)

**JUSTICES' COURTS.** See Appeal, 1, 22; Costs, 2.

**LACHES.** See Contempt, 6; Judgments, 2, 3.

**LANDLORD AND TENANT.** See Leases, 7-9; Unlawful Detainer, 1

**LEASES.**

1. **LANDLORD AND TENANT—SIGN PRIVILEGE—ROOF OF ENTIRE BUILDING—CONSTRUCTION OF LEASE.**—An agreement to lease a one-story building with the exception of the space leased to a third party as a saloon, "lessees to have the exclusive right to the roof for sign space, for which privilege they agreed to keep the roof in good order and repair," includes the space on the roof over the saloon. (*Osborn v. Henry Cowell Lime etc. Co.*, 67.)
2. **ACTION FOR BREACH—INTERPRETATION OF AGREEMENT—STATEMENTS INADMISSIBLE.**—In an action by the lessees against the owner for failure to execute the lease in accordance with such agreement, evidence of conversations between the lessee of the saloon and the plaintiffs, wherein the former had told the latter that his lease included sign privileges over the saloon, was properly disallowed. (*Id.*)
3. **DEMAND FOR LEASE.**—Where it was plain that a demand for the execution of the lease in accordance with the agreement would have been futile, no demand on the part of plaintiffs was necessary. (*Id.*)
4. **FURNISHING OF SATISFACTORY BONDSMEN — MATURITY OF OBLIGATION.**—Where, under such an agreement, the plaintiffs were to furnish satisfactory bondsmen as security for the performance of the covenants of the lease, the obligation to do so did not ripen until the defendant was ready to execute the lease in accordance with the agreement. (*Id.*)
5. **RESCISSION OF ENTIRE CONTRACT—RIGHT OF LESSEES.**—Under such an agreement, the refusal of the owner to execute a lease for the entire roof justified a rescission of the whole contract. (*Id.*)
6. **RECOVERY OF BROKER'S COMMISSIONS — FAILURE TO ENTER INTO SATISFACTORY LEASE—DEFENSE NOT MAINTAINABLE.**—In an action by brokers for their commission for negotiating such a lease, the owner will not be heard to say that a satisfactory lease was not entered into. (*Id.*)
7. **LANDLORD AND TENANT—ACTION FOR RENT UNDER WRITTEN LEASE—LATENT DEFECT IN PREMISES AS DEFENSE—JUDGMENT ON PLEADINGS.**—In an action for rent under a lease stipulating that the premises were in a good and tenantable condition, judgment for plaintiff was properly given on the pleadings where the answer did not deny that the rent was due, but set up the existence of a latent defect unknown to the lessees at the time of the execution of the lease, without, however, any showing that the defect might not

**LEASES (Continued).**

have been discovered, or any attempt to reform the lease on the ground of fraud or mistake. (*Fleishacker v. Moran*, 214.)

8. **TENANCY AT WILL—MODE OF TERMINATION.**—Where a tenant enters agricultural land under oral agreement for lease for two years, and occupies the land for two years, rendering an annual rent which is accepted by the owner, the tenancy thus created must be terminated by the notice prescribed in section 789 of the Civil Code, before the tenant is liable to an action in unlawful detainer. (*Tracy v. Donovan*, 350.)
9. **LANDLORD AND TENANT—ASSIGNMENT OF LEASE—ACTION FOR RENTS—APPEAL FROM JUDGMENT—RECORD—PRESUMPTION.**—On an appeal from a judgment of nonsuit in an action to recover rents accruing under a written lease subsequent to the assignment thereof, where the appeal is presented upon the judgment-roll and a meager statement of stipulated facts, it must be assumed under the pleadings and judgment that when the assignment was made, the assignee entered into no contract with the lessor affirmatively binding himself to fulfill the covenants of the lease, other than such obligations as would be imposed by entry and taking possession of the demised premises. (*Lutton v. Rau*, 429.)
10. **ASSIGNMENT OF LEASE—OBLIGATIONS TO LESSOR.**—An occupant of real property holding possession by bare assignment of the lessee assumes to the lessor only such obligations as arise out of the privity of estate as distinguished from those arising upon privity of contract. (*Id.*)
11. **TERMINATION OF LIABILITY—RIGHT OF ASSIGNEE.**—A covenant to pay rent is deemed to be a covenant running with the land, and an assignee of a lessee, in the absence of express contract, remains liable only for the payment of rent during the period of his occupancy, and may terminate his liability by reassignment. (*Id.*)
12. **SECOND ASSIGNMENT—EVIDENCE.**—In an action by a lessor against an assignee of the lessee for rents accruing subsequent to an assignment in turn by such assignee to others, evidence of the latter assignment was properly excluded. (*Id.*)
13. **NOTICE TO QUIT—PERFORMANCE OF COVENANTS.**—A notice to quit for nonperformance of covenants in a lease need not demand a performance of a covenant to take care of trees, cultivate the ground, or furnish the landlord vegetables, since such covenants could not afterward be performed. (*Zucco v. Farullo*, 562.)
14. **COMMISSION OF WASTE—DEMAND OF PERFORMANCE.**—Where a tenant has committed waste, a notice to quit need not demand performance of the covenants against committing waste, in view of section 1161, subdivision 4, of the Code of Civil Procedure. (*Id.*)

**LEASES (Continued).**

15. **REASON FOR TERMINATING LEASE.**—A notice to quit for failure to perform covenants in a lease need not state the reason for terminating the lease. (Id.)

See Conversion, 2; Judgments, 13; Unlawful Detainer, 6.

**LIENS.** See Mechanics' Liens; Street Law, 2, 3; Vendors' Liens.

**LIFE ESTATE.**

1. **ORAL TRANSFER—WHEN EFFECTUAL.**—An oral transfer of a life estate in land may be made effectual by the taking possession of and the performance by the grantee of acts in reliance upon the grant. (Bekins v. Smith, 222.)
2. **TERMINATION PRIOR TO DEATH OF LIFE TENANT.**—It is not essential to the creation of a valid life estate that there shall be no condition imposed which may terminate the estate in some contingency prior to the death of the grantee. (Id.)
3. **USE OF LAND FOR RELIGIOUS PURPOSES — BREACH — REMEDY.**—An agreement of an owner of land to let another use the land as long as she should continue to conduct the same character of religious services as theretofore creates more than a mere tenancy at will, and in order to have the estate forfeited for breach of condition, it must be done in some proceeding other than that of unlawful detainer. (Id.)

**LIFE INSURANCE.** See Execution, 1.

**LIS PENDENS.** See Mechanics' Liens, 3.

**MANDAMUS.** See Appeal, 2; Reclamation Districts, 1, 2; School Law, 1.

**MECHANICS' LIENS.**

1. **RECOVERY ON STATUTORY BOND—FILING OF LIEN ESSENTIAL.**—Under the mechanic's lien law, only those persons who have filed their claims of lien are entitled to recover upon the statutory bond furnished pursuant to section 1183 of the Code of Civil Procedure. (Crane Co. v. Maryland Casualty Co., 87.)
2. **FARM DEVELOPMENT—STRUCTURE—CONSTRUCTION OF CODE.**—Under section 1183 of Code of Civil Procedure, providing for mechanics' liens on specified improvements "or other structure," farm development consisting of ditches, drains, embankments, and roads, so correlated as to form one harmonious entity designed to convey water to and distribute it over the land, and constituting a permanent improvement thereto, increasing its value, is a "structure." (Mendoza v. Central Forest Co., 289.)

87 Cal. App.—55

## MECHANICS' LIENS (Continued).

3. **TIME FOR FILING—CONSTRUCTIVE COMPLETION OF BUILDING.**—Under section 1187 of the Code of Civil Procedure, as amended in 1911, any of the three following circumstances shall constitute constructive completion of a building, for the purpose of setting the time running for the filing of mechanics' liens, to wit: 1. Occupation of the building; 2. Acceptance of the building by the owner; and 3. Cessation from labor for thirty days. (*Emigh-Winchell Hdw Co. v. Pylman*, 533.)
4. **FAILURE TO FILE NOTICE OF COMPLETION—TIME FOR FILING LIENS.** The last clause of section 1187 of the Code of Civil Procedure, providing that if notice of completion is not filed by the owner he shall be estopped in any foreclosure proceeding from maintaining any defense therein based on the ground that the lien was not filed in time, refers to the completion of the contract under which the material was furnished or the labor done, and if such notice is not filed by the owner, he waives the thirty-day limitation provided by the section; but the ninety-day limitation in the concluding sentence of the section applies to all cases, and all claims of lien must be filed before the expiration of ninety days after the completion of the building, regardless of the filing of notice of completion. (*Id.*)
5. **COMPUTATION OF TIME FOR FILING LIEN—DELIVERY OF HINGES AFTER COMPLETION.**—In determining whether a lien for material used in the construction of a building was filed in time, the delivery to the building about two months after its occupation by the owner of four special hinges of small value, previously ordered by the contractor and afterward paid for by the owner, cannot be taken into consideration. (*Id.*)
6. **ENGINEERING EXPERT—RIGHT TO LIEN.**—An engineering expert employed for a single and specified purpose in the construction of a building, even though he may not be classed as an architect, comes within the provisions of section 1183 of the Code of Civil Procedure, as one bestowing skill to be used in the construction of the building, and is entitled to a lien for the furnishing of engineering designs to the architects. (*Hornlein v. Bohlig*, 646.)
7. **NOTICE TO WITHHOLD—EFFECT OF CODE AMENDMENT.**—Section 1184 of the Code of Civil Procedure, as amended in 1911, does not, save at the option of the owner, secure unto persons giving the requisite notice an equitable garnishment upon the moneys due or to become due to the contractor. (*Id.*)
8. **CONTINUANCE OF LIEN PENDENTE LITE—LIS PENDENS.**—Where an action for the foreclosure of a mechanic's lien is commenced within the ninety-day period provided by section 1190 of the Code of Civil Procedure, the lien continues during the pendency of the action, and it is not essential to file a notice of *lis pendens* in order to

**MECHANICS' LIENS (Continued).**

preserve the lien as against purchasers pending suit. (*Tulloch v. Boyce*, 761.)

**MISCONDUCT.** See Criminal Law, 9.

**MISTAKE.** See Appeal, 21; Contracts, 19, 39; Judgments, 1, 3-5; Street Law, 2.

**MORTGAGES.**

1. **ACTION FOR FORECLOSURE OF MORTGAGE—DEFAULT IN PAYMENT OF INTEREST—LENGTH OF TIME—PLEADING—REFERENCE TO FILING MARK—SUFFICIENCY OF COMPLAINT.**—Where in an action for the foreclosure of a mortgage it appears from the allegations of the complaint that if any of the installments of interest falling due under the terms of the note set forth in the complaint should remain unpaid for thirty days, the principal should forthwith become due at the election of the holder of the note, the complaint is not demurrable for omission to aver that the alleged unpaid interest was more than thirty days overdue, where it is alleged that the principal with a certain amount of interest was due and unpaid, and by turning to the filing-mark on the complaint it can be learned that the pleading was in fact filed more than thirty days after the alleged default in the payment of interest. (*Blake v. Craig*, 327.)
2. **ELECTION TO DECLARE WHOLE AMOUNT DUE—NOTICE—FILING OF COMPLAINT.**—In such an action it is not necessary to allege that the plaintiff had elected to regard the whole amount of the principal as due on the default in payment of interest, since the filing of the complaint was of itself a sufficient notice of such election. (*Id.*)

See Chattel Mortgages; Judgments, 9, 10; Receivers, 1.

**MOTIONS.** See Judgments, 6, 7.**MOTIVE.** See Criminal Law, 19.**MUNICIPAL CORPORATIONS.**

1. **ANNEXATION OF TERRITORY—INHABITED AND UNINHABITED PARCELS—PROCEDURE.**—In this proceeding to test the validity of an attempted annexation to the city of Lemoore of three hundred and eight and one-half acres of land designated as "the 1916 addition to the city of Lemoore," it is held that inasmuch as some of the parcels were inhabited and others uninhabited, the procedure laid down by the act of 1913 (Stats. 1913, p. 587) should have been followed as to the former, and the procedure laid down in the act of 1899 (Stats. 1899, p. 37) as to the latter. (*People v. City of Lemoore*, 79.)

## MUNICIPAL CORPORATIONS (Continued).

2. **PROMOTION UNDER CIVIL SERVICE—NOTICE OF EXAMINATION—RATING “UPON MERITORIOUS ACTS”**—SAN FRANCISCO CHARTER.—Under section 8 of article XIII of the charter of the city and county of San Francisco, providing for promotion under civil service based on “ascertained merit,” the giving by the board of police commissioners of a notice of examination wherein it was said that rating would be “upon meritorious acts” does not show an intent not to promote on a basis of ascertained merit, since there is no distinction between the two terms. (*Uhte v. Rosenthal*, 519.)
3. **CONDITION OF PROMOTION OF POLICEMEN—FILING OF WRITTEN CLAIM OF MERITORIOUS ACTS.**—In arranging for promotion of policemen of the city and county of San Francisco, a member of the department could not complain that the commissioners required, as a condition to promotion, that a claim of meritorious acts in writing be filed and verified by the chief of police, since it was proper for the board to investigate the acts of policemen seeking promotion. (*Id.*)
4. **STATE CIVIL SERVICE ACT—ESTABLISHMENT OF RECORDS OF INDIVIDUAL EFFICIENCY—PROVISION INAPPLICABLE TO SAN FRANCISCO COMMISSION.**—The provision of the State Civil Service Act (Stats. 1913, p. 1035) directing “the state commission to establish in all offices and places of employment records of individual efficiency of holders of positions in performing their duties,” is not binding upon the Civil Service Commission of the city and county of San Francisco. (*Id.*)
5. **STRIKING OF NAMES FROM ELIGIBLE LIST—RIGHT OF CIVIL SERVICE COMMISSIONERS—OTHER PROVISIONS NOT CONFLICTING.**—The provision of section 10 of article XIII of the charter of the city and county of San Francisco permitting the Civil Service Commission to strike names from the eligible register after they have remained thereon more than two years is not in conflict with other charter provisions relating to civil service. (*Id.*)
6. **SAN FRANCISCO—PUBLIC UTILITY ACQUIRED BY CITY—PREFERENCE IN APPOINTMENT OF EMPLOYEES.**—Under article XIII, section 11, subdivision B, of the charter of the city and county of San Francisco, an employee of a municipal railway acquired by the city who have secured standings in examinations are entitled to preference in appointment. (*Kydd v. San Francisco*, 398.)
7. **DISCHARGE OF EMPLOYEES OF MUNICIPAL RAILROAD.**—In view of section 11, article XIII, subdivision A, of the charter of the city and county of San Francisco, an employee of a municipal railway is subject to discharge and suspension at any time without trial, and section 12, of article XIII, providing that no employee in classified service shall be removed except for cause upon written charges, is inapplicable. (*Id.*)

See School Law, 3; Street Law, 12, 13.

NEGLIGENCE.

1. **ACTION FOR DEATH OF EMPLOYEE—CODE PROVISIONS APPLICABLE—INSTRUCTION.**—In an action brought under section 377 of the Code of Civil Procedure by the surviving wife and children as heirs to recover damages for the death of a carpenter employed on a building in course of construction, and alleged to have been caused by the negligence of defendants, it was not error to instruct the jury that the action was properly brought under that section, and an order granting a new trial in such action on the ground that the instruction was erroneous, and that the jury should have been instructed that the action should have been brought under section 1970 of the Civil Code, and maintained for the benefit of the widow alone, instead of the widow and children, was error. (*Valentine v. Hayes*, 42.)
2. **NEW TRIAL—INSUFFICIENCY OF EVIDENCE TO SUPPORT VERDICT.**—In an action to recover damages for the death of a carpenter in falling from a building on which he was employed, where the uncontradicted facts show that the accident was not caused by any improper or faulty or defective construction or dangerous place of work, but solely through the carelessness and negligence of the deceased, an order granting the defendant a new trial is sufficiently supported on the ground of the insufficiency of the evidence to justify the verdict. (*Id.*)
3. **ACTION FOR DEATH—COLLISION BETWEEN AUTOMOBILE AND RAILROAD TRAIN AT CROSSING—EVIDENCE—ABSENCE OF GATES OR BARRIERS—FAILURE TO OBJECT—APPEAL—MATTER NOT REVIEWABLE.** In an action for the death of a passenger in an automobile which collided with a train of flat cars of a railroad company at a crossing over a spur-track, an assignment of error that the absence of gates or barriers at the crossing where the collision occurred was not evidence of negligence because the company was not the owner of the spur-track, and consequently there was no duty imposed upon it to maintain such barriers, will not be considered on appeal, where no objection was interposed at the trial to such evidence. (*Alloggi v. Southern Pacific Co.*, 72.)
4. **INSTRUCTION—PRESUMPTION.**—In such an action, where the jury was instructed that if they found that the track did not belong to the defendant, the defendant was not responsible for the failure to maintain gates, barriers, or flagmen at the crossing, it will be presumed that the jury followed the instruction. (*Id.*)
5. **SHUNTING OF CARS OVER CROSSING WITHOUT WARNING—FAMILIARITY WITH CROSSING IMMATERIAL.**—In such an action, where the evidence was susceptible of the construction that the defendant was guilty of negligence in shunting cars over a crossing used by the public, at night, without lights or attendants upon the cars, and without warning, the familiarity of the driver of the automobile with



## NEGLIGENCE (Continued).

the crossing and his knowledge of its dangerous character, while a factor to be considered in connection with the question of contributory negligence, was in and of itself of no consequence in the determination of the company's negligence in the first instance. (Id.)

6. **FAILURE TO STOP AT CERTAIN POINT—EVIDENCE—LACK OF CONTRIBUTORY NEGLIGENCE.**—In such an action, the driver of the automobile was not guilty of contributory negligence as a matter of law in attempting to cross without first stopping at a point where he would have had a clear view of approaching danger, where by the evidence it did not appear that by looking and listening he could have seen the cars. (Id.)
7. **DUTY TO STOP AND LISTEN AT MOST ADVANTAGEOUS PLACE—INSTRUCTION PROPERLY REFUSED.**—In such an action, it was not error to refuse to instruct the jury that it was the duty of the driver of the automobile to stop, look, and listen at the most advantageous place, since all that was required of him was ordinary care. (Id.)
8. **FAILURE TO CALL WITNESSES—PRESUMPTION—INSTRUCTION.**—In such an action, an instruction to the effect that if the defendant failed to call and examine as witnesses the employees whose fault caused or contributed to the accident, such failure created a presumption that the testimony of such witnesses would be unfavorable to the defendant was properly given, they being in court during the trial. (Id.)
9. **FAILURE TO ANTICIPATE NEGLIGENCE—INSTRUCTION.**—In such an action, an instruction that one is not chargeable with contributory negligence in failing to anticipate the negligence of another, since everyone has the right to presume that others will act in a lawful manner, is erroneous, but harmless, where other instructions were correctly given on the law of contributory negligence. (Id.)
10. **BREAKING OF LEVEE—FLOODING OF LAND—DEFECTIVE CONSTRUCTION OF CANAL—INFERENCE FROM EVIDENCE.**—In this action for damages to crops caused by the flooding of plaintiff's land, due to the breaking of the levee of a reclamation district, it is held that it is not an unreasonable inference that the levee would have not given away if the additional water had not been projected against it by reason of the negligence of the reclamation district trustees in the construction of the canal. (Catlett v. Bennett, 91.)
11. **MEASURE OF DAMAGE TO CROPS.**—In such an action, the measure of plaintiff's damages is to be determined by finding the value of the probable yield and the market value of the crop had it not been damaged, less the cost of producing and marketing the crop. (Id.)
12. **ACTION FOR WRONGFUL DEATH—REFUSAL TO PASS ON CERTAIN ISSUES—PRESUMPTION AS TO EVIDENCE ON OTHER ISSUES.**—In an

NEGLIGENCE (Continued).

action for wrongful death, where the court refused to pass on the issues of negligence and the amount of damages sustained, upon the assumption that plaintiff had no standing in court under a former decision, it cannot be presumed on appeal that there was no evidence on other issues or that the evidence produced was unfavorable to plaintiff. (*McManus v. Red Salmon Canning Co.*, 133.)

13. JURISDICTION OF ACTION.—An action for wrongful death is governed by the law of the jurisdiction where the tort is committed, and as it is a transitory action, it may be maintained in any jurisdiction where the defendant is found, unless the court where the suit is brought, in enforcing the remedy, would be acting in conflict with the express provisions or the general policy of the law of its own jurisdiction. (*Id.*)
14. STATUTORY ACTION UNDER LAWS OF ANOTHER STATE—CONSTRUCTION.—In considering a statutory remedy, such as an action for wrongful death, created by the law of a foreign jurisdiction, the court will adopt the construction of the statute given to it by the courts of that jurisdiction; but if the statute has never been construed in the foreign state, the court will construe it as it would a like statute of its own state. (*Id.*)
15. ACTION FOR WRONGFUL DEATH UNDER LAWS OF ALASKA—BENEFIT OF ESTATE.—Section 1185 of the laws of Alaska, codified by authority of the act of Congress of August 12, 1912, confers a right of action for wrongful death on the personal representatives of the deceased for the benefit of the estate, and any damages recovered become assets of the estate, to be administered like other assets, and the creditors and the expenses of administration to be paid therefrom if necessary, which is contrary to the policy of the laws of the state of California. (*Id.*)
16. LATER ENACTMENT—REPEAL OF FORMER LAW IN CASES OF EMPLOYER AND EMPLOYEE.—Section 1185 of the laws of Alaska, conferring a right of action for wrongful death on the personal representatives of the deceased for the benefit of the estate, was repealed by chapter 45 of the Sessions Laws of Alaska for 1913, as to cases between employer and employee, which provides a remedy for the wrongful death of an employee in accord with the spirit of the laws of California. (*Id.*)
17. ERRONEOUS RULING ON JURISDICTION—AMENDMENT OF COMPLAINT.—Where an action for damages for wrongful death brought under the laws of Alaska was disposed of on an erroneous ruling on a question of jurisdiction alone, the plaintiff, as a matter of substantial justice, should be permitted to amend to supply a necessary allegation, if possible. (*Id.*)
18. VIOLATION OF ORDINANCE.—The violation of an ordinance in and of itself constitutes an established negligence. (*Mora v. Favilla*, 164.)

## NEGLIGENCE (Continued).

19. **FALL UPON WET SIDEWALK—ORDER GRANTING NEW TRIAL—VIOLATION OF ORDINANCE.**—In an action for damages for personal injuries by slipping and falling on a steep sidewalk in the city and county of San Francisco, which had been washed by defendant at an hour when the washing of sidewalks was prohibited by ordinance, an order granting the plaintiff a new trial will not be disturbed on appeal, since the violation of such ordinance constitutes negligence. (Id.)
20. **ACTION FOR MALPRACTICE—MISTAKE OF JUDGMENT—NONLIABILITY FOR DAMAGES.**—In an action against a physician for alleged negligence in the use by him in an operation of nonabsorbable silk sutures instead of catgut, the defendant cannot be held liable where it is shown that he performed two operations, and that on the first he used catgut, from which a hemorrhage resulted, and therefore he used silk in the second operation, it being at most a mistake in weighing the probable consequences of the use of the different materials. (*Linn v. Piersol*, 171.)
21. **PHYSICIANS AND SURGEONS—ORDINARY SKILL.**—A physician is required to possess only ordinary skill in his profession and to use his best judgment in the exercise of that skill. (Id.)
22. **INJURY TO CUSTOMER IN STORE—LIABILITY OF PROPRIETOR—BURDEN OF PROOF.**—In an action by a customer against a storekeeper for personal injuries in stepping into an open trap-door in the rear of the store, upon leaving the toilet used only by employees, the burden is upon the customer to show the breach by the defendant of a duty owing to her. (*Corbett v. Spanos*, 200.)
23. **DUTY OF STORE PROPRIETOR TO CUSTOMER.**—The keeper of a public place of business is bound to keep his premises and the passageways to and from it in safe condition, and use ordinary care to avoid accidents or injury to those properly entering upon his premises on business; but this rule only applies to such parts of the building as are a part of or used to gain access to, or constitute a passageway to and from the business portion of the building, and not to such parts of the building as are used for the private purposes of the owner, unless the party injured has been induced by the invitation or allurement of the owner, express or implied, to enter therein. (Id.)
24. **USE OF EMPLOYEES' TOILET—EVIDENCE—INFERENCE OF GENERAL INVITATION OR INDUCEMENT.**—An inference of a general invitation or inducement by the proprietor of a store to use the employees' toilet in the rear of the store cannot be legitimately drawn from the single instance of its use by a customer by permission of one of the employees. (Id.)
25. **DUTY OF STOREKEEPER TO LICENSEE.**—The only duty of a proprietor of a store to a mere licensee, when in that portion of the premises not customarily used by the public, and to which the

NEGLIGENCE (Continued).

licensee is not expressly or impliedly invited, is to avoid doing any willful or wanton injury to such licensee. (Id.)

26. VIOLATION OF ORDINANCE—NEGLIGENCE—CUSTOMER NOT WITHIN PROTECTIVE TERMS.—The violation by a storekeeper of an ordinance prohibiting for fire protection covering of stairways with permanent flooring is not negligence as to customer injured by falling through trap-door in flooring, since she does not come within the class the ordinance was designed to protect. (Id.)
27. COLLISION BETWEEN AUTOMOBILE AND TAXICAB—CONFLICT OF EVIDENCE—FINDINGS CONCLUSIVE ON APPEAL.—In an action for damages resulting from a collision between an automobile and taxicab, where the evidence is conflicting and contradictory as to whether the collision was due to the negligence of the driver of the taxicab or to the defendant, the findings of the trial court will not be disturbed on appeal. (*White v. Western Fish Co.*, 261.)
28. DAMAGES—CONFLICT OF EVIDENCE—QUESTION FOR TRIAL COURT.—Where the testimony as to damages is conflicting, the amount to be awarded is a question for the determination of the trial court. (Id.)
29. ACTION FOR LOSS OF PROPERTY—FIRE FROM LOCOMOTIVE—EVIDENCE—BURDEN OF PROOF.—In an action against a railroad company for damages for loss of property from fire set by one of its locomotives, the gist of the action is negligence, and the burden of proof is upon the plaintiff. (*Renter v. San Pedro etc. R. R. Co.*, 277.)
30. RAILROAD CORPORATIONS—LIABILITY FOR FIRES.—A railroad company is not an insurer at all events against the consequences of fire set by its locomotives, but it is only liable for fires negligently caused by it, and the facts upon which the liability rests cannot be established by mere conjecture but must be proved by satisfactory evidence. (Id.)
31. APPEAL—SCOPE OF REVIEW.—In an action against a railroad company for damages for loss of property by fire negligently set by one of its engines, the appellate court cannot, on appeal from the judgment, take the place of the trial court for the purpose of determining whether the findings are supported by a preponderance of the evidence, but will consider the evidence solely for the purpose of determining whether or not the essential findings of fact are supported by satisfactory evidence tending substantially to establish the facts as found. (Id.)
32. NEGLIGENCE OF DEFENDANT—FINDINGS SUPPORTED BY EVIDENCE.—In this action against a railroad company for damages for loss of property from fire negligently set, it is held that there was satisfactory evidence to support the findings that the fire which destroyed the property had its origin in fire which escaped with the smoke from the engine of the defendant, and that the fire and

## NEGLIGENCE (Continued).

the consequent damage was occasioned by careless and negligent management of the engine. (Id.)

33. **INJURY TO HOSPITAL PATIENT—CARELESSNESS OF NURSES—EVIDENCE—DIRECTED VERDICT FOR DEFENDANT.**—In an action against a hospital corporation for injuries sustained by a pay patient through the negligence of nurses employed by the corporation the court correctly directed a verdict for defendant where it was shown that the hospital was not formed for pecuniary profit, that no profit was in fact made, and no evidence was offered to show that defendant was negligent in employing incompetent nurses. (*Burdell v. St. Luke's Hospital*, 310.)
34. **COLLISION AT RAILROAD CROSSING—EXCESSIVE SPEED OF TRAIN—QUESTION FOR JURY.**—In an action by a passenger in an auto stage for personal injuries received from a collision with a freight train at a point where the highway crossed the railroad track, the question whether thirty miles an hour was an excessive rate of speed for the train when approaching the crossing was for the jury. (*Ellis v. Central California Trac. Co.*, 390.)
35. **SIGNAL OF APPROACH OF TRAIN—QUESTION FOR JURY.**—In such an action, the question whether the train sounded or gave any warning of its approach to the crossing was for the jury. (Id.)
36. **PLEADING—SUFFICIENCY OF COMPLAINT.**—In such an action, the complaint states a cause of action where after alleging that the auto in which plaintiff was riding was a public conveyance, and after describing the crossing, it averred the defendant ran one of its trains across the highway in a negligent manner and at negligent speed, without giving any signals, so that plaintiff, while traveling with due care, was injured. (Id.)
37. **CONTRIBUTORY NEGLIGENCE—PLEADING AND EVIDENCE.**—In an action for personal injuries, contributory negligence is a defense which may be set up, and if set up, must be supported by defendant. (Id.)
38. **OWNERSHIP OF AUTO—IMMATERIAL AVERMENT.**—In such an action, it is not necessary that the complaint should show who was the owner or driver of the auto at the time of the collision. (Id.)
39. **DUE CARE—NEGLIGENT OPERATION OF TRAIN—PROPER ALLEGATIONS.** In such an action, allegations in the complaint that plaintiff was traveling with due care and that defendant ran its train across the crossing in a negligent manner and at negligent speed are not improper, as mere conclusions of law. (Id.)
40. **INJURY TO PASSENGER IN AUTO STAGE—NEGLIGENCE OF DRIVER NOT IMPUTABLE TO PASSENGER—LACK OF CONTROL.**—In such an action, assuming that the driver of the auto stage was negligent, and that his negligence concurring with that of the railroad company brought about the collision and its results, the plaintiff cannot be charged

NEGLIGENCE (Continued).

with such negligence, having no authority or control over the driver. (Id.)

41. **CONDUCT OF PASSENGER UPON OBSERVATION OF DANGER—LACK OF NEGLIGENCE.**—In such action, the passenger cannot be charged with negligence because on seeing the approach of the train he jumped from his seat on the side door of the stage into the middle of the car and held on to the front seat. (Id.)
42. **PERSON IN GREAT PERIL—CARE.**—A person in great peril when immediate action is necessary to avoid it is not required to exercise all that presence of mind and carefulness which are justly required of a careful and prudent man under ordinary circumstances. (Id.)
43. **APPROACH OF RAILROAD CROSSING—DUTY OF TRAVELER.**—It is the duty of a traveler on a highway approaching a railroad crossing to use ordinary care in securing a time and place to stop, look, and listen for coming trains, and he is negligent if he merely looks or listens, believing the people in charge of the train will ring the bell or sound the whistle. (Id.)
44. **EVIDENCE—ACTS OF OTHER PASSENGER.**—In such an action, the court properly refused to strike out on defendant's motion the answer given by another passenger that he did not watch or notice other passengers and that he could see those in front of him glancing up and down the track, as the driver did. (Id.)
45. **CONFLICT OF EVIDENCE—PROOF BEYOND PREPONDERANCE—ERRONEOUS INSTRUCTION.**—In such an action, where the evidence is contradictory, an instruction requiring proof beyond the preponderance of the evidence is erroneous. (Id.)
46. **AMOUNT OF VERDICT—INSTRUCTION.**—In such an action, an instruction that if plaintiff was injured as described, the jury should render a verdict for full amount of "damages," not exceeding the amount prayed for, is not erroneous, as an unqualified direction to return a verdict for the full amount. (Id.)
47. **DROWNING OF CHILD IN CEMETERY RESERVOIR—PLEADING—RIGHTS OF LOT OWNERS AND PUBLIC—SURPLUSAGE.**—In an action to recover damages for the death of child by drowning in a reservoir maintained by defendant in its cemetery, where children were permitted freely and without hindrance to go and come, allegations as to the rights of lot owners and visitors, and as to the right of the public to use a certain roadway for the purpose of passing through the cemetery, were surplusage. (*Polk v. Laurel Hill Cemetery Assn.*, 624.)
48. **EXCAVATION ADJOINING HIGHWAY—INSUFFICIENT ALLEGATION.**—In such an action, an allegation in the complaint that in a prominent place in the cemetery and "immediately alongside" one of the drive-ways therein, and only a short distance from a certain entrance to the cemetery, the defendant dug, excavated, and constructed and

## NEGLIGENCE (Continued).

- still maintains in a prominent place a large reservoir for the holding of water, does not bring the case within the class where an excavation has been dug or maintained "adjoining a highway" into which a traveler on the highway, where he had the right to be, had accidentally fallen. (Id.)
49. **RULE OF TURNTABLE CASES.**—Where dangerous and attractive machinery is maintained unguarded and exposed to the observation and temptation of little children, the natural allurements of which will tempt them to go about or upon, and against the danger of which action their immature judgment interposes no warning or defense, the conduct of the party in so maintaining such machinery involves an act of negligence for which he is liable in damages where a child of the above description, having gone upon or played about and with the machinery, is thereby injured, notwithstanding that the child so injured is a trespasser upon the land upon which the machinery is maintained. (Id.)
50. **QUALIFICATION OF RULE.**—The rule is to be understood with the qualification that the dangers of the machinery, although novel and attractive to the immature mind of a child, can be fully or sufficiently guarded to protect against injury without destroying its usefulness for the purpose for which it is maintained. (Id.)
51. **GENERAL INVITATION TO VISIT CEMETERY—RIGHT OF CHILDREN TO USE AS PLAYGROUND NOT INCLUDED.**—A permissive general invitation to visit a cemetery, not abandoned, but parked and having driveways, does not include the granting of a privilege to children to make a playground of the place. (Id.)
52. **KNOWLEDGE OF USE OF CEMETERY AS PLAYGROUND—LICENSEES.**—Mere knowledge by a cemetery association that children habitually went into the cemetery and therein indulged in their childish sports would make the children at most mere licensees, to whom the association owed no duty or obligation. (Id.)
53. **NONLIABILITY UNDER RULE OF TURNTABLE CASES.**—A cemetery association maintaining an unguarded reservoir alongside a driveway near an entrance to the cemetery is not liable, under the rule of the turntable cases, for the drowning of a child of the age of eight years. (Id.)
54. **COLLISION WITH AUTOMOBILE OF EXPOSITION COMPANY—INJURY TO PEDESTRIAN—NEGLIGENCE OF SUPERINTENDENT OF GROUNDS—EVIDENCE—USE ON PRIVATE BUSINESS.**—An exposition company cannot be held liable for damages for personal injuries received by a pedestrian from a collision with an automobile owned by the company and negligently driven by its superintendent of grounds, where at the time of the accident the superintendent was on his way home from work, where the machine remained until taken to the grounds, where it was kept nights. (*Mauchle v. P. P. Int. Exp. Co.*, 715.)

NEGLIGENCE (Continued).

55. **MOTOR VEHICLE LAW—KEEPING TO RIGHT—CONSTRUCTION OF STATUTE.**—The provision of the motor vehicle law (Stats. 1913, p. 648) that the person in control of any vehicle moving slowly along and upon any public highway shall keep such vehicle as closely as practicable to the right-hand boundary of the highway, allowing more swiftly moving vehicles reasonable free passage to the left, is elastic, and does not attempt to lay down a definite and rigid rule as to the distance which the slowly moving vehicle must keep from the curb. (Id.)
56. **EVIDENCE—DISTRUST OF FALSE WITNESS—INSTRUCTION.**—The failure to instruct the jury that a witness false in one part of his testimony is to be distrusted in others is not error where the instruction is not requested. (Id.)  
See Accident Insurance, 1.

NEGOTIABLE INSTRUMENTS. See Promissory Notes.

NEW TRIAL.

1. **ORDER GRANTING NEW TRIAL—ERRONEOUS REASON—APPEAL—SCOPE OF REVIEW.**—Where a motion for a new trial is based upon several grounds, and the reason for granting the motion is erroneous, the appellate court is not concluded by such reason, but may examine the record to determine if the new trial should have been granted on any of the grounds set forth in the notice of intention, except as to the sufficiency of the evidence, where it is conflicting. (Valentine v. Hayes, 42.)
2. **ORDER GRANTING NEW TRIAL—REASONS NOT SPECIFIED—RULE ON APPEAL.**—Where a new trial is granted without specifying reasons, if there is any good reason contained in the notice of motion, the order will not be disturbed on appeal. (Mora v. Favilla, 164.)
3. **NEWLY DISCOVERED EVIDENCE—DENIAL OF MOTION—APPEAL.**—An adverse ruling on a motion for a new trial on the ground of newly discovered evidence will not be disturbed on appeal, in the absence of a plain showing of abuse of the power of the court. (Nave v. Graham, 332.)  
See Criminal Law, 48; Negligence, 2, 19.

NONSUIT. See Attachment, 3, 4; Condemnation of Land, 6.

**NOTICE.** See Attorney at Law, 1; Judgments, 16; Leases, 13-15; Mechanics' Liens, 4, 7; Sales, 6, 8; Street Law, 18, 25, 26; Unlawful Detainer, 10.

NUISANCES. See Red-light Abatement Act, 1.



**OFFICES AND OFFICERS.** See *Municipal Corporations*, 2-5; *Public Officers*.

**ORDER TO SHOW CAUSE.** See *Judgments*, 7.

### ORDINANCES.

**MUNICIPAL CORPORATIONS—ORDINANCE PROHIBITING WASHING OF SIDEWALKS BETWEEN CERTAIN HOURS—PURPOSE.**—An ordinance of the city and county of San Francisco making it unlawful to wash a sidewalk between the hours of 8 A. M. and 6 P. M. was designed principally to protect people upon the streets from the inconvenience or danger of wet and slippery sidewalks, rather than to conserve the water supply of the city. (*Mora v. Favilla*, 164.)

See *Negligence*, 18, 19, 26.

### PARENT AND CHILD.

1. **AWARD OF CUSTODY TO ONE PARENT—OTHER PARENT NOT LIABLE FOR SUPPORT.**—Where by a decree of divorce the custody of the minor children of the parties is awarded to one of the parents, without charging upon the other parent the support of such children, the parent to whose custody the children are so awarded is, under the terms of section 196 of the Civil Code, alone liable for their support, and the parent not entitled to the custody of the minors is relieved of that duty. (*In re Perry*, 189.)
2. **OMISSION TO PROVIDE FOR MINOR CHILD—UNWARRANTED COMMITMENT.**—Where in an action for divorce the custody of the minor children of the parties was awarded to the mother, but no provision was made in the decree for their support, an order holding the husband to answer in the superior court for the alleged violation of section 270 of the Penal Code, and the commitment thereupon issued, are void and of no legal force. (*Id.*)

### PARTIES.

**PLEADING—ACTION AGAINST WIFE.**—Under the provisions of section 370 of the Code of Civil Procedure, it is not sufficient to merely name the husband as a party defendant in an action against his wife, but he must also be served with summons. (*Fassio v. Woolfrey*, 754.)

See *Deeds*, 7; *Joinder*; *Partition*, 1; *Unlawful Detainer*, 6.

### PARTITION.

**PERSONAL MONEY JUDGMENT—JURISDICTION.**—In an action in partition, where the complaint alleged that one of the defendants had acquired an undivided two-thirds interest in the property from his codefendants with full knowledge that plaintiff had a claim against said codefendants for money advanced by plaintiff upon their part of the purchase price, such codefendants were proper, if not neces-

**PARTITION (Continued).**

sary, parties to the action, and their disclaimer filed in the action did not prevent the court from rendering a personal judgment against them in favor of plaintiff for the amount of such advancement. (*Donnelly v. Wetzel*, 741.)

**PAUPERS.** See Costs, 2.

**PAYMENT.** See Promissory Notes, 3.

**PERMITS.** See Street Law, 6.

**PHYSICIANS AND SURGEONS.** See Negligence, 20, 21.

**PLEADING.**

1. **OMISSION OF PRAYER—RELIEF.**—In view of the provisions of section 580 of the Code of Civil Procedure, the plaintiff in an action may have some relief although the complaint omits the prayer therefor as required by section 426 of such code, where issue has been raised by answer. (*Hoffman v. Pacific Coast Const. Co.*, 125.)
2. **AMENDMENT OF COMPLAINT—SUPPLYING OF PRAYER.**—The prayer to a complaint, when omitted, may be amended or supplied to conform to the cause of action stated in the complaint. (*Id.*)
3. **ATTACHMENT—COMPLAINT OMITTING PRAYER.**—A complaint in an action for money, although containing no prayer for relief, is sufficient as a basis for a writ of attachment, where the pleading is accompanied by the affidavit and undertaking required by the statute, notwithstanding in its then form, no answer having been filed, a judgment could not be legally entered. (*Id.*)
4. **ACTIONS FOR INJURIES TO PERSON AND PROPERTY—JOINDER IN SAME COMPLAINT.**—In view of section 427 of the Code of Civil Procedure, as amended in 1915, a cause of action for damages to property and a cause of action for injury to health may be joined in the same complaint, where both grow out of and are the direct result of the same tort. (*Weissband v. City of Petaluma*, 296.)
5. **ACTION FOR DAMAGES AND INJUNCTION—JOINDER.**—It is not improper to unite a cause of action for damages with a cause of action for injunctive relief. (*Id.*)
6. **ACTION FOR MEDICAL SERVICE—SINGLE CAUSE OF ACTION.**—A complaint in an action by a physician for services, which include the claims of two other physicians for services performed with the defendant's consent, states but a single cause of action in favor of the plaintiff, where it is alleged that the charges of the latter were made against the plaintiff personally and formed part of his account. (*Myers v. Canepa*, 556.)
7. **SUFFICIENCY OF PLEADING.**—If a complaint states a cause of action sufficient as against a general demurrer to sustain the relief actually

**PLEADING (Continued).**

given in the judgment, it will not be held invalid because it also states facts authorizing other relief. (*Zucco v. Farullo*, 562.)

8. **ORDER SUSTAINING DEMURRER—SILENCE AS TO AMENDMENT—JUDGMENT.**—An omission in an order sustaining a demurrer to a complaint to say anything about leave to amend does not prevent judgment from being entered. (*Kydd v. San Francisco*, 598.)

See Appeal, 19, 20; Bonds, 2, 3; Chattel Mortgages, 1; Condemnation of Land, 2; Contracts, 4, 20; Criminal Law, 5-8; Easements 1-3; Joinder; Negligence, 17, 36-39, 47, 48; Sales, 9; Slander, 1, 2; Unlawful Detainer, 2, 6, 9, 11.

**PLEDGE.**

**PROMISSORY NOTE — WRONGFUL RETENTION — ACTION FOR VALUE — EVIDENCE.**—In an action to recover the reasonable value of a collateral note wrongfully retained, the plaintiff cannot recover where the evidence shows an agreement that the defendant was to hold the note until plaintiff's principal note was paid, and that the payment had not been made. (*Van Hagen v. First State Bank of Clovis*, 141.)

**POLICE OFFICERS.** See Municipal Corporations, 2-5.

**POSSESSION.** See Chattel Mortgages, 2; Fraudulent Conveyances, 1.

**PRESCRIPTION.** See Waters and Water Rights, 1, 2.

See Appeal, 7, 17, 18, 23; Brokers, 7; Criminal Law, 34; Husband and Wife, 1; Negligence, 8, 9, 12; Statutory Construction, 1, 2.

**PRIVILEGED COMMUNICATIONS.** See Evidence, 4.

**PROBATION.** See Criminal Law, 11.

**PROMISSORY NOTES.**

1. **THREAT OF CRIMINAL PROSECUTION—PUBLIC POLICY—VOID INSTRUMENT.**—A promissory note obtained by threats of criminal prosecution for embezzlement is against public policy and void. (*Merchants' Coll. Agency v. Roantree*, 88.)
2. **ACTION ON PROMISSORY NOTE—EVIDENCE—MANNER OF PAYMENT—LETTER OF THIRD PARTY INADMISSIBLE.**—In an action on a note indorsed and transferred to plaintiff by defendant in consideration of the transfer to the latter of an option to purchase real property owned by plaintiff and a third party, a letter written by such third party to defendant stating that the note was to be paid from the sale of stock of a corporation to be organized for the disposal of the

## PROMISSORY NOTES (Continued).

- property was not admissible as against plaintiff, the note being plaintiff's property. (*Vandelinder v. Roberts*, 404.)
3. **TIME OF PAYMENT—PAROL EVIDENCE.**—Where a promissory note is by its terms made payable on a certain date, parol evidence is inadmissible in an action on the note to show that it was not to be paid until judgment was recovered in a certain pending action. (*Pringle v. Aston*, 409.)
4. **NEGOTIABLE INSTRUMENTS—NOTICE OF PROTEST BY MAILING—STATEMENT IN CERTIFICATE OF PROTEST.**—Where a notice of protest of a promissory note is given by mail, the provisions of subdivision 3 of section 3144 of the Civil Code must be followed, which permits the mailing to residence alone, and a protest which recites that notice was mailed to the office of the indorser is not *prima facie* evidence of the matters stated therein as declared by section 795 of the Political Code. (*Whitcomb v. Huse*, 248.)
5. **ACTION ON PROMISSORY NOTE—LACK OF CONSIDERATION—FRAUD—SUFFICIENCY OF EVIDENCE.**—In this action by the assignee of a promissory note executed to a corporation in payment for stock, it is held the evidence supports the finding that there was no consideration for the note, and that it was obtained by the corporation through fraudulent representations. (*Burns v. Bauer*, 251.)
6. **NOTE PROCURED BY FRAUD—ACTION BY ASSIGNEE—INNOCENT HOLDER—BURDEN OF PROOF.**—In an action by the assignee of a corporation on a note given in payment for its stock, and procured from the maker by fraud and misrepresentations, the burden is upon the assignee to prove he is an innocent holder. (*Id.*)
7. **ACTION ON PROMISSORY NOTE—INTEREST—RATE IN EXCESS OF LIMITATION OF PERSONAL PROPERTY BROKER'S ACT—WHEN ALLOWABLE.** In an action on a promissory note bearing interest at the rate of five per cent per month, interest is to be calculated at such rate in the judgment, where the note is unsecured and no showing made that the plaintiff was a personal property broker. (*Davidson v. Rafael*, 258.)
8. **HUSBAND AND WIFE—DEED TO WIFE—NOTE OF WIFE TO HUSBAND'S CREDITOR—SUFFICIENCY OF CONSIDERATION.**—Where a husband, upon being told that he was about to die, made a deed of all his property to his wife, and the wife at the same time and at her husband's request signed a note to a person to whom the husband was indebted for money loaned, the advantage gained by the wife in not having to probate the estate, and the disadvantage of the creditor in not being able to collect his debt out of the estate, constituted a sufficient consideration for the note. (*Molloy v. Pierson*, 486.)
9. **DELIVERY—PRESUMPTION FROM POSSESSION.**—A promissory note found in the possession of the payee will be presumed to have been delivered to him upon its date. (*Id.*)

See Contracts, 35; Pledge, 1.

37 Cal. App.—56

## PUBLIC OFFICERS.

1. **COPYISTS IN RECORDER'S OFFICE—COMPENSATION—WORDS ACTUALLY COPIED.**—Copyists in the office of the county recorder are entitled to be paid only for the words actually copied by them into the books of record, and are not entitled to compensation for the words contained in the printed forms in such books. (*Frame v. Barnum*, 411.)
2. **WARRANT FOR CLAIM—PRESENTATION TO SUPERSEDEAS FOR ALLOWANCE—CONDITION PRECEDENT.**—A claim for compensation for services as copyist in the recorder's office must be presented to and allowed by the board of supervisors before the county auditor is authorized to draw his warrant for its payment. (*Id.*)
3. **DISTRICT ATTORNEY—AUTHORITY TO EMPLOY DETECTIVES.**—Under section 4307, subdivision 2, of the Political Code, a district attorney is authorized to employ detectives at the expense of the county, when necessary for the detection of persons guilty of crimes or to obtain evidence of their guilt. (*Thiel D. Co. v. Tuolumne Co.*, 423.)
4. **COMPENSATION FOR DETECTIVE SERVICES—PRESENTATION OF CLAIM—PROCEDURE UPON REJECTION.**—A claim for detective services performed by a county at the request of the district attorney must be presented to the board of supervisors, and if it be rejected, the claimant may bring his action as provided by section 4078 of the Political Code. (*Id.*)
5. **CLAIMS AGAINST COUNTIES—ACTION BY BOARDS OF SUPERVISORS—WHEN NOT FINAL.**—Where a claim has been allowed in full by the board of supervisors, if it be within the jurisdiction of such tribunal, it can only be attacked by a suit in equity on the ground of fraud. If it be apparent that the board has exceeded its jurisdiction in the allowance of the claim, the order may be nullified through an action brought in court, or such order may be disregarded and treated as nugatory by any officer who is called upon to give effect to the invalid determination of the board. If, however, a claim within the power of the board to allow has been rejected, or allowed only in part, the decision of the board is not final, but by virtue of the statute the claimant may bring his action at law and establish his claim against the county as fully and effectively as it could be by a favorable order of the board in the first instance. (*Id.*)
6. **MUNICIPAL CORPORATIONS—SAN FRANCISCO BOARD OF FIRE COMMISSIONERS AND SECRETARY—CIVIL SERVICE.**—Under the charter of the city and county of San Francisco, the words "fire department" as employed in the civil service section of the charter are not intended to embrace the board of fire commissioners nor the secretary thereof, and therefore such secretary does not come under the protection of section 12 of article XIII providing that no person employed in the classified civil service shall be removed or discharged, except for cause, upon written charges and after an opportunity to be heard in his own defense. (*McCarthy v. Board of Fire Commrs.*, 445.)

---

**PUBLIC OFFICERS (Continued).**

**7. COMPENSATION OF SHERIFF OF LOS ANGELES COUNTY—DELIVERING PERSONS TO STATE INSTITUTIONS—COUNTY MONEY.**—The sheriff of the county of Los Angeles is not entitled to retain for his own use moneys received by him from the state, under sections 4175 and 4176 of the Political Code, for delivering prisoners and insane persons to state institutions, but he is required to turn the same into the county treasury, since the ordinance of the board of supervisors of such county fixing the compensation of such officer, passed under the power granted by the freeholder's charter of that county, is the measure of the right to compensation. (*County of Los Angeles v. Cline*, 607.)

See Counties, 1.

**PUBLIC USE.** See Street Law, 19–22.

**PUBLIC UTILITIES ACT.** See Contracts, 2; Street Law, 8.

**QUIETING TITLE.** See Ejectment, 2, 4.

**RAILROADS.** See Negligence, 29, 30.

**RECEIVERS.**

**APPOINTMENT UPON EX PARTE APPLICATION — FAILURE TO REQUIRE BOND—VOID ORDER.**—An order appointing a receiver in an action for the foreclosure of a mortgage without requiring the undertaking provided by section 566 of the Code of Civil Procedure is void, notwithstanding the default of the defendants, where there were no allegations in the complaint upon which a receiver could have been appointed, and no notice given the defendants of the application for the appointment. (*Van Alen v. Superior Court*, 696.)

**RECLAMATION DISTRICTS.**

- 1. ENTRY OF CREDIT ON ASSESSMENT—MANDAMUS—ESSENTIALS.**—To entitle land owners to *mandamus* to compel entry of a credit on a reclamation district assessment declared invalid after payment of the assessment, it is incumbent upon them to show that they are injured by failure to so credit their land. (*Spurrier v. Neumiller*, 683.)
- 2. ADVANTAGE OVER OTHER LAND OWNERS — MANDAMUS.**—*Mandamus* will not lie at the instance of land owners to compel the entry of a credit on an invalid assessment, where it appears that, if the writ were granted, they would gain an advantage over other land owners who have already been charged with an excess amount to equalize the burden. (*Id.*)

## RECLAMATION DISTRICTS (Continued).

3. **INTEREST ON PAYMENTS—INSUFFICIENT GROUND FOR WRIT.**—Where land owners have been given credit on an invalid reclamation district assessment, and they did not demand or claim interest, they are not entitled to the writ because interest was disregarded. (Id.)
4. **LAND OWNERS, WHEN NOT ENTITLED TO CREDIT.**—Section 3466½ of the Political Code, in its original form, does not entitle land owners to reimbursement where the payments were made by former owners, and no showing is made that they expended anything therefor or incurred liability in consequence thereof. (Id.)
5. **CHANGE OF POLICY OF REASSESSMENTS—CODE AMENDMENT—CONSTITUTIONAL LAW.**—The legislature in amending section 3466½ of the Political Code (Stats. 1911, p. 647) changed the policy of levying reassessments in reclamation districts, but did not thereby deprive any land owners of any contractual right, and the application of such amended section is not violative of section 10, article I, of the federal constitution, or of section 16, article I, of the state constitution. (Id.)
6. **PAYMENTS UNDER VOID ASSESSMENT—RIGHT TO CREDIT—MANDAMUS.**—Judgment affirmed on the authority of *Spurrier et al. v. Neumiller, etc., ante*, p. 683. (Krohn v. Reclamation District, 818.)

## RED-LIGHT ABATEMENT ACT.

1. **NUISANCE—ABATEMENT UNDER RED-LIGHT ACT—DISMISSAL OF PROCEEDING.**—In an action to enjoin the use of property for immoral purposes under the Red-light Abatement Act, where it is shown that the nuisance had been abated before the action was commenced, the proceeding will be dismissed. (*People v. Dillman*, 415.)
2. **EVIDENCE—EXPLANATION OF VISITOR—TESTIMONY OF POLICE OFFICERS—HEARSAY.**—In such an action, testimony of police officers, who raided the premises, that a man found in the room of an inmate of the house had told them that he was there for an immoral purpose was hearsay and inadmissible. (Id.)
3. **IMPROPER CORROBORATION.**—In such an action, it is not proper to corroborate the testimony of a police officer, by permitting another officer to testify that he had heard the testimony and that it was true in all particulars. (Id.)
4. **DECREE ENJOINING USE OF PROPERTY FOR IMMORAL PURPOSES—TITLE NOT CLOUDED.**—A decree under the Red-light Abatement Act enjoining defendants from using certain real property for immoral purposes, but not closing the premises or ordering the sale of furniture or taxing costs, is not prejudicial, as clouding the title to the property. (Id.)

REFORMATION OF INSTRUMENTS. See *Judgments*, 13.

REMEDIES. See *Public Officers*, 5.

**RESCISSION.** See Leases, 5; Vendor and Vendee, 1.

**RES JUDICATA.** See Bonds, 4.

**RIGHT OF WAY.** See Contracts, 1.

**SALES.**

1. **BREACH OF WARRANTY—PROCREATIVE POWERS OF STALLION—RECOVERY OF PRICE—BURDEN OF PROOF.**—In an action to recover upon promissory notes given for the payment of a stallion, which was sold under a written guaranty that he was a sixty per cent foal-getter, and that if not, the sellers would furnish another stallion upon his redelivery, it was incumbent upon the defendant, in order to defeat the action upon the theory that the guaranty contained the real agreement of the parties, to show that the horse failed to meet the procreative requirement, that he was properly cared for, and that the defendant delivered or was legally excused from delivering him to the sellers in as good condition as when sold. (*Edson v. Mancebo*, 22.)
2. **RETURN OF STALLION—OFFER OF BUYER—SUFFICIENCY OF.**—Under such a warranty, where the buyer, upon discovery of the lack of potency of the stallion, offered to return the animal, but the sellers refused to furnish him with another horse, such refusal relieved the buyer of an obligation to do more than to offer to make the return. (*Id.*)
3. **TIMELY OFFER TO RETURN.**—Where such warranty was not limited to one season and the buyer, upon discovery of the lack of potency of the horse, did not make offer to return him until the early part of the next season, the offer was timely, it not being unreasonable to try him another season. (*Id.*)
4. **ACTION FOR PRICE OF ENGINE—BREACH OF WARRANTY—SUFFICIENCY OF EVIDENCE.**—In this action on a note for the balance of the price of a tractor engine, it is held that the evidence supports the findings that the engine never at any time measured up to the warranted test, that the defendant never at any time unconditionally accepted it, and that the whole transaction was subject of controversy founded on repeated complaints. (*Ventura Mfg. etc. Co. v. Warfield*, 147.)
5. **BREACH OF WARRANTY—QUESTION FOR JURY.**—In an action on a note for the balance of the price of a tractor engine, the question of breach of warranty, where the findings are conflicting, is for the jury. (*Id.*)
6. **NOTICE OF DEFECTS—WAIVER.**—The requirement in a contract for the sale of a tractor engine that notice of the failure of the engine to work properly must be given within a specified time is waived by the continued and persistent efforts of the agents of the seller,



**SALES (Continued).**

including the one who made the sale, to make the machine work, after the expiration of the time limited. (Id.)

7. **AUTHORITY OF SALE'S AGENT.**—Authority of an agent who makes a sale of a tractor engine extends to all such acts as are properly connected with the sale and delivery of the machine, and does not stop when the proposed vendee first takes the machine on trial, but continues until the sale is completed or the machine returned. (Id.)
8. **KNOWLEDGE OF DEFECTS—WAIVER OF NOTICE.**—The provision in a contract of sale of a tractor engine that the purchaser shall give written notice to the seller of any defects, and that failure so to do shall constitute a waiver of breach of warranty, is waived where the agent who made the sale is present at the trial of the machine, and thus has knowledge of failure of performance. (Id.)
9. **ACTION FOR PRICE OF ENGINE—OMISSION TO PLEAD—WAIVER—TRIAL.**—In an action on a note for the balance of the price of a tractor engine, although the defendant did not specially plead waiver of condition in the warranty as to the time for trying out the machine, the case was not tried erroneously on the theory of such waiver where the answer and cross-complaint set out all the facts of the transaction. (Id.)
10. **DEFAULT OF VENDEE—RETAKING OF POSSESSION AND RESALE BY VENDOR—NONLIABILITY FOR CONVERSION.**—A vendor of personal property which had been delivered to the vendee under a conditional sale contract, which authorized the vendor to demand and have possession of the property "at any time before said sale and transfer," cannot be held guilty of conversion in taking possession of the property under a claim and delivery action and thereafter making a resale thereof, where the vendee was in default and made no reasonably prompt tender of performance. (*Magee v. Burt*, 737.)
11. **OWNERSHIP OF CATTLE—CONFLICT OF EVIDENCE—FINDING—APPEAL.**—In an action to recover the price of certain cattle, wherein the defense on the merits was that the cattle were purchased by defendant from the father of plaintiffs, and hence defendant was not indebted to plaintiffs in any sum, the finding of the jury on such issue on conflicting evidence is conclusive on appeal. (*Wahl v. Yori*, 773.)
12. **EVIDENCE—CONTRADICTORY STATEMENTS CONCERNING OWNERSHIP.**—In such an action, it was permissible to ask the defendant on direct examination to state conversations he had with the father of the plaintiffs concerning the ownership of the cattle for the purpose of showing that the father had made statements contradictory to those to which he had testified. (Id.)
13. **OWNERSHIP OF CATTLE—STATEMENTS INADMISSIBLE.**—In such an action, statements made by the father not in the presence and

**SALES (Continued).**

hearing of the plaintiffs, or either of them, are not admissible for the purpose of showing title in the father. (Id.)

See Contracts, 29-34, 41; Fraudulent Conveyances, 1-3; Trusts, 1; Vendor and Vendee, 1.

**SCHOOL LAW.**

1. **DISCHARGE OF TEACHER—CITY OF OAKLAND—POWER OF BOARD OF EDUCATION.**—The board of education of the city of Oakland had unrestricted and absolute power to discharge a teacher in its school department for the ensuing fiscal year by giving the notice required by section 1617, subdivision 7b (now section 1609), of the Political Code, and *mandamus* will not lie to compel such board to reinstate a teacher dismissed for violating a rule of the board which provided that when a woman employee married, her position should become vacant. (Catania v. Board of Education, 593.)
2. **SUPERINTENDENT OF SCHOOLS OF CITY OF MARYSVILLE—CHARTER PROVISION NOT REPEALED BY CODE.**—Section 1617 of the Political Code, relating to the establishment and maintenance of schools in cities as part of the common school system of the state and which provides that boards of education in city school districts shall have power to employ a city superintendent of schools and fix and order paid his compensation, has not repealed by implication the provision of the charter of the city of Marysville which provides that the county superintendent of schools of Yuba County shall be *ex-officio* superintendent of public schools for the city of Marysville, and which fixes his compensation. (Malaley v. City of Marysville, 638.)
3. **SCHOOL DISTRICT AND MUNICIPALITY—EXERCISE OF SAME POWERS.**—A municipality and a school district, the territorial boundaries of which are the same as those of the city, notwithstanding they are different and separate or distinct corporate entities, may, if the legislature elects to give them the right so to do, exercise precisely the same identical power with respect to matters connected with and calculated to further the interests of the public school system, in so far as such city and school districts are concerned, and merely because the Political Code in its provisions establishing a system of common schools, confers upon the board of education of a city the power to employ a superintendent of city public schools, it does not follow that the provision of a city charter authorizing the county superintendent to perform the duties of city superintendent thereby becomes a dead letter. (Id.)

**SENTENCE.** See Criminal Law, 23, 32, 39.

**SERVICES.**

**ACTION FOR SERVICES—REASONABLE VALUE—PAYMENT—INSUFFICIENCY OF FINDINGS.**—In an action to recover for services rendered, where

**SERVICES (Continued).**

by the pleadings the reasonable value of the services and the question of payment are made the chief issues, and no finding is made as to the reasonable value of the services other than that plaintiff worked "at the rate of thirty-five dollars a week," and no finding at all is made on the issue of payment, the judgment in plaintiff's favor is not supported by the findings. (*Mueller v. Mouren*, 768.)

See *Architecture*, 1; *Pleading*, 6.

**SIDEWALKS.** See *Ordinances*, 1.**SLANDER.****1. PLEADING—DENIAL ON INFORMATION AND BELIEF INSUFFICIENT.—**

In an action for slander, the defendant cannot deny the use of the words alleged to have been used, upon information and belief, as under section 437 of the Code of Civil Procedure positive knowledge is presumed. (*Nave v. Graham*, 332.)

**2. DENIALS UPON LACK OF INFORMATION INSUFFICIENT.—**In an action for slander, an answer containing denials of the allegations of the complaint based upon lack of information sufficient to form a belief is insufficient. (*Id.*)**SPECIFIC PERFORMANCE.** See *Contracts*, 8, 9, 42.**STATUTE OF FRAUDS.** See *Contracts*, 32; *Trusts*, 15.**STATUTE OF LIMITATIONS.** See *Banks*, 2; *Contempt*, 4-6; *Criminal Law*, 5; *Street Law*, 4; *Trusts*, 5; *Workmen's Compensation Act*, 1.**STATUTORY CONSTRUCTION.****1. DIFFERENT LANGUAGE — PRESUMPTION.—**When different language is used in the same connection in different parts of a statute, it is presumed the legislature intended a different meaning and effect. (*McCarthy v. Board of Fire Commrs.*, 495.)**2. REPEATED USE OF PHRASE—PRESUMPTION.—**A word or phrase repeatedly used in a statute will be presumed to bear the same meaning throughout the statute, unless there is something to show that another meaning is intended. (*Id.*)**3. APPLICABILITY OF RULE OF STATUTORY CONSTRUCTION.—**The rule that all parts of a statute must be construed so as to be effective applies to the construction of municipal charters. (*Uhte v. Rosenthal*, 520.)

See *Street Law*, 28.

**STOCK AND STOCKHOLDERS.** See *Corporations*, 1, 2.

**STREET LAW.**

- 1. PROCEEDINGS UNDER IMPROVEMENT ACT OF 1911—DOING OF WORK BY PROPERTY OWNERS—DUTY AS TO AWARDED OF CONTRACT.—**Under the part of section 12 of the Street Improvement Act of 1911 (Stats. 1911, p. 730), providing that the owners of three-fourths of the lots liable to be assessed may within ten days after the first publication of the notice of award of contract elect to take said work and enter into a contract for the doing of the same, and that if they fail to so elect the superintendent of streets shall enter into a contract with the person to whom the contract was awarded, when the board of trustees makes its award, its powers and duties in respect to the letting of the contract cease, and it then becomes the duty of the superintendent of streets to enter into the contract, and a notice given by the property owners to the trustees within the ten days confers no rights upon the property owners nor imposes any duty upon the trustees. (*Wentland v. Clark & Henery Const. Co.*, 34.)
- 2. TIME OF COMPLETION OF CONTRACT—MISTAKE IN RECORDING CONTRACT—VALIDITY OF LIEN UNAFFECTED.—**A lien for street work done under the Improvement Act of 1911 is not invalid because of an error in copying into the record kept by the superintendent of streets that the contract was to be completed within 80 days, the original contract on file calling for 180 days, since the lien existed before the making of the record. (*Id.*)
- 3. PLANS FOR WORK—ERRONEOUS STATEMENT OF FRONTAGE—VALIDITY OF ASSESSMENT UNAFFECTED—REQUIREMENTS OF SPECIFICATIONS.—**An assessment for work done under the Improvement Act of 1911 is not invalid for the reason that the plans which accompanied the specifications indicated an erroneous frontage as to some of the property owners, where the specifications and resolution of intention did not call for the improvement of a certain number of feet in front of each lot, but for the improvement of the street between certain stated points. (*Id.*)
- 4. MUNICIPAL CORPORATIONS—STREET WORK UNDER PRIVATE CONTRACT IN SAN FRANCISCO—RUNNING OF STATUTE OF LIMITATIONS—RESOLUTION OF ACCEPTANCE.—**Under article VI, chapter I, section 22, and chapter II, section 9, subdivisions 9 and 10, of the charter of the city and county of San Francisco, providing that private contracts for street work shall be done under the direction and to the satisfaction of the board of public works, and that such satisfaction shall be declared by resolution, the statute of limitations does not start to run against the contractor until the adoption of such resolution, regardless of the time of the actual completion of the work. (*Flinn v. Zion*, 110.)
- 5. APPLICABILITY OF CHARTER PROVISION TO CONTRACTS.—**The requirement of article VI, chapter I, section 22, of the charter of the city

**STREET LAW (Continued).**

- and county of San Francisco that private contracts for street work must contain a "provision" that all materials used must be to the satisfaction of the board of public works, applies to all contracts for street work, public as well as private, in so far as the statute of limitations is concerned. (Id.)
6. **PERMIT FOR STREET WORK.**—The charter of the city and county of San Francisco nowhere provides that the person actually performing street work under a private contract must himself obtain the permit, the only requirement being that such permit be obtained. (Id.)
7. **INSTALLATION OF ELECTRIC LIGHTING SYSTEM — IMPROVEMENT ACT OF 1911.**—The installation of an electric street lighting system in a municipality is authorized by the Improvement Act of 1911 (Stats. 1911, p. 730), notwithstanding the title of the act provides for "work" in and upon streets, as subdivision 2 of section 79 in defining the word "work" was intended to include street-lighting systems. (*Park v. Pacific Fire Extinguisher Co.*, 112.)
8. **ENACTMENT OF PUBLIC UTILITIES ACT OF 1913—IMPROVEMENT ACT OF 1911 NOT REPEALED BY IMPLICATION.**—The Improvement Act of 1911 covering street improvement alone was not repealed by implication by the Public Utilities Act of 1913 covering the acquisition of public utilities. (Id.)
9. **CREATION OF STREET-LIGHTING SYSTEM—PROCEDURE UNDER IMPROVEMENT ACT OF 1911—RIGHT OF MUNICIPALITY.**—While street lighting is a municipal affair, where the municipality has not provided a complete procedure for the creation of a street-lighting system as empowered to do by its charter, it may follow the provisions of the Improvement Act of 1911. (Id.)
10. **CONNECTION OF WIRES WITH ELECTRIC DISTRIBUTING SYSTEM OF PUBLIC UTILITY—CONSTITUTIONAL AMENDMENT NOT VIOLATED.**—The improvement of streets by the construction and installation of electroliers and a conduit system for the purpose of lighting such streets, cost of the improvement to be made a charge upon the property within the district, does not violate section 1 of article XIV of the amendments to the constitution of the United States, in providing that the electroliers be wired and connected by the underground system of conduits with a public utility company's lines, since the improvement does not become the property of the utility company, but the property of the city. (Id.)
11. **REFERENCE TO STREETS TO BE IMPROVED—INSUFFICIENCY OF RESOLUTION OF INTENTION.**—A resolution of intention for improving streets in installing an electric lighting system, not naming the streets, and providing that the work was to be done according to certain specifications which did not name the streets, but referred to plans attached which contained a legend designating colors by which the proposed improvements could be located, does not comply with

**STREET LAW (Continued).**

- the requirements of section 8 of the Improvement Act of 1911, providing that the resolution of intention shall refer to the street to be improved by its lawful or official name or by the name by which it is commonly known. (Id.)
12. **MUNICIPAL CORPORATIONS—IMPROPER IMPROVEMENT OF CITY STREET—DAMAGE TO PROPERTY OWNER—PLEADING—IMPROVEMENT UNDER MUNICIPAL AUTHORITY—SUFFICIENCY OF COMPLAINT.**—In an action against a municipal corporation for injuries to person and to property from the improper grading, filling, and improvement of a city street, the complaint is not subject to the objection that it fails to show that the work was done under the authority of the defendant, where it is alleged that the defendant caused the work to be done. (*Weissband v. City of Petaluma*, 296.)
13. **DAMAGE TO PROPERTY OWNER—LIABILITY OF MUNICIPALITY FOR IMPROPER STREET IMPROVEMENT.**—A municipal corporation is liable to a property owner for the flooding of his property from the improvement of a street on which his property abuts, where the work was done strictly in accordance with plans and specifications adopted for the work, and such plans and specifications did not provide for adequate means for taking care of the surface waters which would accumulate on the property. (Id.)
14. **FLOODING OF DWELLING—RAISING TO PROPER HEIGHT—PROPER ELEMENT OF DAMAGE.**—In an action against a municipal corporation for damages caused by the alleged flooding of plaintiff's dwelling from the improvement and grading of a street, the expense necessarily incident to the raising of the structure to a height preventing the water from entering the dwelling is an element of damages, notwithstanding the raising increased the value of the premises. (Id.)
15. **CITY OF PETALUMA—IMPROVEMENT UNDER STATE LAW—PRELIMINARY ORDINANCE ADOPTING PROCEDURE UNNECESSARY—CHARTER.**—In the doing of street work in the city of Petaluma under the provisions of the act of March 6, 1889 (Stats. 1889, p. 70), it is not necessary that the city, prior to entering upon the work, should adopt an ordinance electing to proceed under the state law and adopting its procedure as the one to be followed in making the improvement, as section 21 of article III of the charter, requiring that such work should be done by ordinance not in conflict with state laws, must be read in connection with section 68 of the same article, which provides that in the absence of any procedure for carrying out or effectuating any granted or implied power or authority, the general law of the state shall be followed. (*City of Petaluma v. Hughes*, 473.)
16. **IMPROVEMENTS UNDER ACT OF 1911—RESOLUTION OF INTENTION—NAMES OF STREETS.**—In street improvement proceedings under the Improvement Act of 1911 (Stats. 1911, p. 730), the streets to be improved need not be mentioned by their official names in the reso-

**STREET LAW (Continued).**

lution of intention, but may be referred to by the names by which they are commonly known. (*Federal Construction Co. v. Kneese, 659.*)

17. **UNCERTAINTY AS TO LOCATION OF LINES—DEFECT IN RESOLUTION OF INTENTION CURED BY PLANS AND SPECIFICATIONS.**—Uncertainty as to the location of certain lines in the resolution of intention is cured by the plans accompanying the resolution and the specifications referred to therein, wherein the location of such lines is made certain. (*Id.*)
18. **CHANGE OF GRADE—PROCEEDINGS UNDER ACT OF 1909—HEARING OF PROTESTS—PERSONS ENTITLED TO NOTICE.**—In a proceeding for the change of the grade of a street under the Change of Grade Act of 1909 (*Stats. 1909, p. 1018*), the proceeding is valid, notwithstanding upon the hearing of protests notice was only given of the hearing of such protests to the persons protesting, since under such act no notice is required to be given of such hearing to nonprotesting owners. (*Id.*)
19. **ASSESSMENT—STATE UNIVERSITY LAND.**—Before land, a portion of which is actually in use by a state university for educational purposes, may be subjected to the lien of a street assessment, it must be separable from the remainder of the property for the public use of which it is a part without impairing the value of the property for the public use to which the occupied portions of it are already put. (*Raisch v. Regents of U. C., 697.*)
20. **STRIP OF LAND FORMING PART OF UNIVERSITY BLOCK—NONLIABILITY FOR STREET ASSESSMENT.**—A strip of land fronting on a street and forming about one-seventh of a block owned by the state university, six-sevenths of which is occupied by college buildings, is not separable from the remainder without impairing its use, and therefore cannot be subjected to the lien of a street assessment. (*Id.*)
21. **ASSESSMENT WHOLLY VOID.**—An assessment of a block of land belonging to the state university for street improvement is wholly void where six-sevenths of the block is occupied by college buildings. (*Id.*)
22. **ASSESSMENT OF NONASSESSABLE LAND—WAIVER AND ENFORCEMENT OF LIEN AGAINST OTHER LAND NOT PERMISSIBLE.**—Where an assessment of a block of land for street improvement was void, because six-sevenths of the land was occupied by college buildings of a state university devoted to public use, and therefore not subject to assessment, the contractor cannot waive his lien as to the six-sevenths and enforce it against the one-seventh. (*Id.*)
23. **INVALIDITY OF ASSESSMENT—FAILURE TO PROTEST TO COUNCIL—PROPERTY OWNER NOT ESTOPPED.**—A property owner is not estopped from asserting the invalidity of a street assessment because he failed to protest to the city council or because he remained silent while the work was being done. (*Id.*)

**STREET LAW (Continued).**

- 24. REGULARITY OF PROCEEDINGS—ISSUANCE OF BONDS—CONCLUSIVE EVIDENCE.**—In street improvement proceedings, where there is an evident attempt in good faith to comply with the statute, and such substantial compliance therewith that no one has suffered from lack of strict compliance, the issuance of bonds is conclusive evidence of the regularity of the jurisdictional proceedings. (*Gordon v. Ransome-Crummey Co.*, 755.)
- 25. POSTING OF NOTICES—ISSUANCE OF BONDS—CURE OF TRIFLING DEFECT.**—In view of section 66 of the Improvement Act of 1911 (Stats. 1911, p. 730), a defect in the posting of two notices of the passage of the resolution of intention, in that they were posted 309 feet 4 inches apart instead of three hundred feet, as required by section 5 of the act, is cured by the issuance of bonds. (Id.)
- 26. NOTICES OF IMPROVEMENT—POSTING—SUFFICIENCY OF AFFIDAVIT.**—An affidavit as to completion of posting of the notice of improvement stating that the affiant had actually posted the notice on the street to be improved to a certain line, which line did not, however, mark the termination of the improvement, is sufficient where it was also stated in the affidavit that affiant "posted said notices conspicuously along the line of said contemplated work or improvement at not more than three hundred feet in distance apart and not less than three in all, and when the work was to be done upon an entire crossing or any part thereof, in front of each quarter block liable to be assessed." (Id.)
- 27. COMPLETION OF POSTING OF NOTICES—SUFFICIENCY OF AFFIDAVIT.**—An affidavit stating "that affiant posted said notices as herein specified on the 25th day of May, A. D. 1911," is a sufficient statement that the posting was "completed" on such date, as required by section 5 of the act. (Id.)
- 28. LIBERAL CONSTRUCTION OF ACT OF 1911.**—The Improvement Act of 1911 by its own provisions is to be liberally construed to the end that its purposes may be effected (Stats. 1911, p. 768, sec. 82), and the provisions regarding the posting of notices and the like are to be read in the light of the purpose to be accomplished. (Id.)
- 29. ELECTION OF PROPERTY OWNERS TO DO WORK—CONSTRUCTION OF IMPROVEMENT ACT OF 1911.**—Judgment affirmed upon the authority of *Wentland et al. v. Clark & Henery Construction Co.*, ante, p. 34. (*Lillie v. Clark & Henery Const. Co.*, 815.)

**STREETS.** See *Street Law*, 16.

**SUMMONS.** See *Judgments*, 13; *Parties*, 1.



**SUPERSEDEAS.**

1. **NATURE OF REMEDY.**—The remedy of *supersedeas* is usually regarded as injunctive or prohibitive in character and not corrective. (Craig v. Stansbury, 668.)
2. **EXECUTION SALE AFTER APPEAL — VACATION — INHERENT POWER OF APPELLATE COURT.**—The appellate court, however, has inherent power by writ of *supersedeas* to vacate an execution sale made after the perfecting of an appeal and the giving of a stay bond. (Id.)
3. **SALE BEFORE APPEAL—REMEDY.**—Where an execution sale has been completed before the appellate court acquires jurisdiction of the appeal, the court, in view of section 946 of the Code of Civil Procedure, has no power by writ of *supersedeas* to set aside the sale, but any right of the judgment debtor to set aside the sale must be enforced in the trial court. (Id.)

**TAXATION.** See Unlawful Detainer, 8.

**TELEGRAPHS AND TELEPHONES.** See Contracts, 1, 2.

**TENDER.** See Sales, 2.

**TIME.** See Appeal, 5; Costs, 1; Mechanics' Liens, 4, 5.

**TITLE.** See Adverse Possession, 1; Contracts, 11; Husband and Wife, 1, 2; Trusts, 11.

**TRANSFER.**

1. **ACTION TO SET ASIDE TRANSFER OF INTEREST IN ESTATE—MENTAL INCAPACITY AND UNDUE INFLUENCE—JUDGMENT SUPPORTED BY EVIDENCE.**—In this action by the widow and minor child of a deceased person against the mother, brothers and sister of deceased, and certain corporation defendants to set aside, upon the ground of decedent's mental incapacity and the undue influence of his relatives, a certain transaction whereby deceased transferred his one-eighth interest in his father's estate to the defendant corporation, and took one-eighth of the stock in return therefor, it is held that the evidence is sufficient to support the judgment for defendants. (Dow v. George E. Dow Estate Co., 20.)
2. **CONSIDERATION OF TESTIMONY — DISCRETION NOT ABUSED.**—In such an action, it is not an abuse of discretion to accept the testimony of defendant's witnesses, although they only saw the deceased occasionally, in preference to that of plaintiff's witnesses, who saw him every day during his last illness, which began some time prior to the transfer. (Id.)

---

**TRANSFER (Continued).**

- 3. INTIMATE ACQUAINTANCES — INFREQUENT VISITS — INSUFFICIENT GROUND FOR DISQUALIFICATION.**—In such an action, the mother, brothers, and sister of deceased are not disqualified to testify as intimate acquaintances because their visits to the deceased during the last few years of his life were rather infrequent. (Id.)

See Life Estate, 1.

**TRESPASS. See Negligence, 49.****TRUSTS.**

- 1. SETTLEMENT OF ACCOUNT—BROKERS' COMMISSION—SALE OF TRUST PROPERTY—PROPER ITEM.**—A trustee under a trust which bound him to sell the real property of the trust estate and to distribute the proceeds is entitled to have allowed him in his account the usual and reasonable commission paid by him to certain real estate brokers through whose efforts the sale was made, where the trustee made repeated efforts to make the sale himself and was unable to do so. (Rutherford v. Ott, 47.)
- 2. CARE OF CEMETERY PLOT OF TRUSTOR — PAYMENT TO RECTOR OF CHURCH—PROPER ITEM.**—A trustee is entitled to have allowed him in the settlement of his account an amount paid, in accordance with the provisions of the trust, to the rector of a church to insure appropriate care of the cemetery plot of the author of the trust, since such payment did not involve a perpetuity. (Id.)
- 3. GIFTS FOR MASSES—VALID PROVISION OF TRUST.**—A provision in a trust for the payment of specified sums of money to certain churches for masses is not void on the ground that the churches had not the legal capacity to take the donations, since the same are gifts to the persons to whom the revenues of the churches are payable or by whom they are controlled and disbursed. (Id.)
- 4. GIFTS IN EXCESS OF ONE-THIRD OF ESTATE—VALID PROVISIONS.**—Gifts to charity under a trust created in the lifetime of the trustor which exceed one-third of the trust estate, are not void, since section 1313 of the Civil Code applies only to wills. (Id.)
- 5. ACTION TO ENFORCE TRUST—STATUTE OF LIMITATIONS.**—An action by the administrator of the estate of a deceased person to recover a sum of money from the defendants upon allegations that they received the money in trust for the heirs of the deceased upon a fire insurance policy is barred by the provisions of section 343 of the Code of Civil Procedure, requiring actions for relief not otherwise provided for to be commenced within four years, where the action was not commenced within four years of the time when the defendants filed their answer in another action to have it declared that they held the insured property in trust, in which latter action they set up adverse possession. (Croce v. Bazzura, 167.)

## TRUSTS (Continued).

6. **DISTRIBUTION OF TRUST ESTATE TO HEIRS OF TRUSTEE—BUNNING OF STATUTE OF LIMITATIONS.**—Where property held in trust is distributed to the heirs of the trustee, the heirs take as involuntary trustees, the statute of limitations to recover the property begins to run at the time of distribution, and no repudiation of the trust is necessary to set the statute in motion. (Id.)
7. **PAROL TRUST IN REAL PROPERTY—EVIDENCE.**—In an action to establish a parol trust in real property, the testimony of the plaintiffs without corroboration is sufficient to warrant a judgment in their favor. (Id.)
8. **CHARACTER OF EVIDENCE.**—In order to prove a trust in real property by parol under a deed absolute in its terms, the evidence must be clear, satisfactory, and convincing. (*Turman v. Ellison*, 205.)
9. **QUESTION FOR TRIAL COURT—APPEAL.**—The determination of the sufficiency of evidence to establish a trust in real property is for the trial court, and the same will be accepted as conclusive by the appellate court. (Id.)
10. **FINDINGS SUPPORTED BY EVIDENCE.**—In this action to have it declared that defendants were holding certain real property in trust for the plaintiffs under a conveyance absolute in its terms, it is held that the findings against the existence of the trust are supported by the evidence. (Id.)
11. **GIFT OF MONEY FOR BENEFIT OF THIRD PARTY.**—Where a person during his last illness, upon discovering that he had unintentionally omitted to remember a servant in his will, directed his son, who had a power of attorney authorizing him to sign checks in the name of his father, to draw one thousand dollars from the bank and give it to his wife for such servant, and the son on the same day drew a check in the name of his father on the bank and mailed it to another bank together with a letter containing instructions to place the same to the account of the wife, and the wife was thereafter informed of what had been done, a transfer of a present, immediate, and indefeasible title to the money in favor of the servant was thereby created. (*Heitman v. Cutting*, 236.)
12. **IMPLIED ACCEPTANCE OF TRUST.**—Under such circumstances, a tacit acceptance of the trust by the wife is implied from silence. (Id.)
13. **NECESSITY FOR TRUSTEE—EQUITY.**—Equity will never allow a trust to fail for want of a trustee. (Id.)
14. **CONSTRUCTIVE TRUST—PURCHASE OF MINING PROPERTY—TAKING OF DEED IN NAME OF OPTION-HOLDER.**—Where a party has an option to purchase mining property for a certain sum, although it is apparently for a greater sum, and for a valuable consideration such party transfers the option to a third party and the latter pays to the owner the full consideration for the property, but the deed

## TRUSTS (Continued).

is taken in the name of the original holder of the option, a constructive trust is thereby created in favor of the purchaser. (*Hope Mining Co. v. Burger*, 239.)

15. **DEED ABSOLUTE ON FACE—PAROL EVIDENCE—STATUTE OF FRAUDS.**—Under the statute of frauds it is the general rule that parol evidence cannot be received to prove that a deed absolute on its face was given in trust for the benefit of the grantor. (*Bradley Co. v. Bradley*, 263.)
16. **FRAUD—EXCEPTION TO RULE.**—Where, however, by means of an oral promise made without any intention of performing it, one obtains an absolute deed without giving any consideration therefor, it is a case of actual fraud, and the statute of frauds is not a bar to relief. (*Id.*)
17. **CONSTRUCTIVE FRAUD—VIOLATION OF PROMISE TO RECONVEY.**—If a grantee by means of a parol promise to reconvey obtains an absolute deed without consideration from one to whom he stands in a confidential relation, the breach of the promise is constructive fraud, although at the time it was made there was no intention not to perform. (*Id.*)
18. **ACTION TO DECLARE TRUSTS—SUFFICIENCY OF EVIDENCE.**—In this action to declare defendant an involuntary trustee of certain real property, it is held that the evidence sustains the finding that the conveyance was made upon the understanding that the property was to be held in trust and to be reconveyed upon demand. (*Id.*)
19. **EXISTENCE OF CONFIDENTIAL RELATIONSHIP—SUFFICIENCY OF EVIDENCE.**—In this action, it is also held that the evidence supports the finding that a confidential relationship existed between the parties at the time of the delivery of the deed. (*Id.*)
20. **CONFIDENTIAL RELATIONSHIPS—INFERENCE FROM PROVEN FACTS.**—There are certain relationships from the existence of which the law infers special confidence, such as those of husband and wife, parent and child, guardian and ward, counsel and client, etc., but it also exists in numerous cases where the facts proven will warrant the inference. (*Id.*)
21. **REPUDIATION—USE OR OCCUPATION OF PROPERTY WITHOUT CHARGE—TRUSTEE NOT ENTITLED.**—A trustee who fraudulently refuses to reconvey property to its legal owner, and who repudiates the trust, is not entitled to use or occupy any part of the trust property free of charge. (*Bradley Co. v. Bradley*, 268.)
22. **BANKING LAW—DEPOSITS FOR COLLECTION.**—The deposit of mortgages and other specific instruments for collection or the drawing of a draft on a debtor and giving it with specific instructions to collect and remit is a trust transaction, and the money, if collected, is affected with the trust. (*Hing v. Lee*, 313.)

**TRUSTS (Continued).**

23. **CHANGE FROM TRUST TO DEBTOR RELATION.**—While the trust relation might be changed by custom or agreement into that of debtor and creditor after the collection of the proceeds, the bank cannot divest itself of the trust relation and assume the other at its own convenience. (Id.)
24. **COLLECTION OF INSURANCE POLICY—PAYMENT TO SHERIFF ON GARNISHMENT PROCEEDINGS AGAINST INSURER — BREACH OF TRUST.**—Where a bank collects an insurance policy and is instructed by the insurer to pay the claim of the bank and hold the balance for the insurer until called for, the balance constitutes a trust fund, and it is a clear violation of such trust for the bank to pay over the same to the sheriff on garnishment proceedings without giving the insured any notice in order that he might make a claim of exemption. (Id.)

See Ejectment, 1, 2.

**UNDERTAKING.** See Appeal, 5.

**UNDUE INFLUENCE.** See Transfer, 1.

**UNLAWFUL DETAINER.**

1. **LANDLORD AND TENANT—EXISTENCE OF RELATION ESSENTIAL.**—The relation of landlord and tenant is a necessary prerequisite to an action for unlawful detainer under section 1159 of the Code of Civil Procedure. (Bekins v. Smith, 222.)
2. **SPECIAL NATURE OF PROCEEDING.**—The summary proceeding for obtaining possession of real property is special and must be restricted to the particular purposes expressed in the code provisions. (Chase v. Peters, 358.)
3. **PLEADING — CROSS-COMPLAINT NOT ALLOWABLE.**—In the summary proceeding for obtaining possession of real property, a counterclaim or cross-complaint is not allowed. (Id.)
4. **DAMAGES.**—In unlawful detainer, only those damages accruing during the actual period of the unlawful detention are recoverable. (Id.)
5. **EXTENT OF RECOVERY.**—In unlawful detainer, no recovery is authorized of any money, the right to which accrued before the unlawful detention began, except arrears of rents. (Id.)
6. **ASSIGNMENT OF LEASE—PLEADING—PARTIES.**—In an action in unlawful detainer, where it appears that the lease did not prohibit an assignment, but provided that the contract should bind the lessee and his assigns, and the lessee prior to the accrual of any rents assigned the lease to a third person, the original lessee was not a proper party defendant. (Id.)

UNLAWFUL DETAINER (Continued).

7. **TAX CHARGES NOT RECOVERABLE.**—In unlawful detainer, tax charges paid by the lessor cannot be recovered. (Id.)
8. **RECOVERY OF TAX CHARGES—PREJUDICIAL ERROR.**—In unlawful detainer, error in allowing recovery of taxes paid by the lessor and arrears of rent from the original lessee are more than mere errors of pleading or procedure under section 4½ of article VI of the constitution. (Id.)
9. **PLEADING.**—In an action in unlawful detainer, the complaint need not set out in full the notice to quit, it being sufficient to allege its legal effect. (*Zucco v. Farullo*, 562.)
10. **SERVICE OF NOTICE.**—In an action in unlawful detainer, plaintiff need only allege that he served notice in writing, on defendant, or that notice in writing was served. (Id.)
11. **RECOVERY OF TAXES AND RENTS—MISJOINDER OF CAUSES OF ACTION.** Judgment reversed and trial court directed to enter judgment for appellant on the authority of *Chase v. Peters et al.*, ante, p. 358. (*Chase v. Peters*, 815.)

See Appeal, 20; Life Estate, 3.

VEHICLE ACT. See Criminal Law, 26; Negligence, 55.

VENDOR AND VENDEE.

**ORAL CONTRACT FOR SALE OF LAND—DESTRUCTION OF PROPERTY—RECOVERY OF MONEY PAID.**—Where a purchaser of land under an oral contract goes into possession and makes a part payment and agrees to pay the balance at a future date, when the property is to be conveyed to him and before the time for payment the building on the land is destroyed by fire, the purchaser may rescind and recover the money paid, since the contract is not an executed one under section 1661 of the Civil Code. (*Wong Ah Sure v. Ty Fook*, 465.)

See Sales, 10; Vendors' Liens, 1.

VENDORS' LIENS.

1. **SALE OF PROPERTY—CONSIDERATION—CORPORATION STOCK.**—In this action to enforce a vendor's lien upon certain real estate, it is held that there is nothing in the language of the instruments involved, nor in the circumstances surrounding the transaction, nor in the conduct of the parties, to warrant the conclusion that a cash payment for the property was contemplated, the sole consideration for the conveyance being the transfer to the vendor of corporation stock. (*Doty v. California Rice Milling Co.*, 449.)
2. **VENDOR'S LIEN—PAYMENT OF PRICE IN STOCK—CODE SECTION INAPPLICABLE.**—Section 3046 of the Civil Code, giving one who sells

**VENDORS' LIENS (Continued).**

real property a vendor's lien independent of possession for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer, does not apply where the price is paid by the issuance of shares of corporation stock. (Id.)

3. **SALE OF PROPERTY FOR STOCK—ESCROW—DELIVERY UPON PAYMENT OF EXISTING MORTGAGE—RIGHT OF VENDOR.**—Where an agreement for the sale of real property subject to a mortgage provided that corporation stock was to be issued in payment for the property and placed in escrow as security for the performance of the vendor's agreement to convey the property free from liens, the vendor cannot, in an action to enforce his alleged lien, claim that he had not received the stock, since he could at any moment demand the same upon performance of the condition. (Id.)
4. **ACTION TO ENFORCE VENDOR'S LIEN—EVIDENCE—NOTICE OF LIEN—TESTIMONY ERRONEOUSLY EXCLUDED.**—In an action to enforce a vendor's lien upon certain real estate, where the pleadings raised the issue as to whether the vendee or its transferee was a purchaser for value without notice of the vendor's rights, objections to testimony of officers of the corporations defendant that they had no notice of knowledge of plaintiff's claim of lien were erroneously sustained. (Id.)
5. **VENDOR'S LIEN—PAYMENT IN CORPORATE STOCK.**—Judgment reversed on the authority of *Doty v. California Rice Milling Co. et al., ante*, p. 449. (*Doty v. Matson*, 817.)

**VENUE.** See Negligence, 18.

**VERDICT.** See Ejectment, 8; Negligence, 33.

**WAGES.**

1. **WAGE ACT—IMMEDIATE PAYMENT UPON DISCHARGE—PENALTY FOR FAILURE RECOVERABLE BY EMPLOYEE—CONSTITUTIONAL LAW—UNIFORM OPERATION OF GENERAL LAWS PROVISION NOT VIOLATED.**—The act approved May 1, 1911 (Stats. 1911, p. 1268), and the amendment thereof approved April 28, 1915 (Stats. 1915, p. 299), providing that whenever an employer discharges an employee, wages due and unpaid shall become payable immediately, and imposing a penalty for nonpayment recoverable by the employee, is not violative of article I, section 11, of the constitution, providing all general laws shall have uniform operation. (*Moore v. Indian Spring etc. Min. Co.*, 370.)
2. **PASSAGE OF LOCAL LAW PROVISION NOT VIOLATED.**—Such act is not violative of article IV, section 25, subdivision 33, of the constitution, providing the legislature shall not pass local or special laws where a general law can be made applicable. (Id.)

---

WAGES (Continued).

3. **DUE PROCESS OF LAW PROVISION NOT VIOLATED.**—Such act is not violative of the fourteenth amendment to the federal constitution, providing no state shall deprive any person of life, liberty, or property without due process of law. (Id.)

**WAIVER.** See Appeal, 1; Costs, 1; Criminal Law, 27; Evidence, 4; Execution, 2; Jury Trials, 1, 2; Sales, 6, 8, 9; Street Laws, 22.

**WARRANTY.** See Sales, 2-6, 8.

## WATERS AND WATER RIGHTS.

1. **PRESCRIPTIVE TITLE—BURDEN OF PROOF.**—In an action between riparian owners for the admeasurement of the waters of a creek, the burden of establishing all the elements of a prescriptive right rests upon the defendants claiming such rights. (*Skelly v. Cowell*, 215.)
2. **EVIDENCE—PRESCRIPTIVE RIGHT NOT ESTABLISHED.**—Use by a riparian owner of the waters of a creek is not such as to establish a prescriptive right where he used the water, or a large part of it, when he needed it, but not regularly, sometimes letting it go down the creek, and never using it in such a way as to deprive his neighbors lower on the stream of the use of it according to their rights. (Id.)
3. **NECESSITY FOR IRRIGATION—PLEADINGS—SPECIFIC FINDING, WHEN NOT REQUIRED.**—In an action involving conflicting claims to the waters of a certain creek, a specific finding that irrigation is necessary on the lands of the defendant is not required where it appears by the allegations and admissions of the pleadings that the lands involved are situated in an arid climate, and there is no denial of the allegation of the cross-complaint that the character of all the lands, the soil thereof, and the climatic conditions of the neighborhood are such that artificial irrigation is necessary. (*Campbell v. Ingram*, 728.)
4. **QUANTITY OF WATER NECESSARY FOR IRRIGATION—FINDING—SPECIFIC FINDING, WHEN NOT REQUIRED.**—In such an action, the failure to make a specific finding that a certain number of inches of water are necessary for the irrigation of defendant's land does not constitute reversible error where there is a finding that the amount has been used for years, without objection, for the irrigation of hay and grain and for garden purposes. (Id.)
5. **JUDGMENT—FAILURE TO AWARD SPECIFIC AMOUNT OF WATER—WHEN NOT VOID FOR UNCERTAINTY—IMPOSSIBILITY OF DETERMINATION IN ADVANCE.**—A judgment which does not award a specific amount of water to the plaintiff, but requires the defendant to permit plaintiff to use whatever water is necessary for the use of his



---

**WATERS AND WATER RIGHTS (Continued).**

stock in the corral below defendant's dam, is not void for uncertainty where it is impossible to determine in advance the amount that may be required for this purpose. (Id.)

See Contempt, 5, 7.

**WILLS.** See Trusts, 4.

**WORKMEN'S COMPENSATION ACT.**

1. **PROCEEDINGS FOR COMPENSATION FOR "FURTHER DISABILITY"—TIME LIMITATION.**—Under section 16, subdivision c, of the Workmen's Compensation, Insurance and Safety Act, relating to the right to institute proceedings for the collection of compensation for "further disability," the additional disability may reasonably be defined as referring to any disability in addition to that for which proceedings were commenced within six months from the date of the injury, or that for which disability indemnity has been paid or agreed to be paid, and if there have been no proceedings commenced within six months from the date of the injury, and if there has been no payment of disability indemnity or agreement therefor, the employee is not entitled to institute proceedings grounded upon "further disability" after the expiration of six months from the date of the injury. (*Kauffman v. Industrial Acc. Com.*, 500.)
2. **DEATH OF DRIVER OF TRANSFER TRUCK — ACCIDENT ARISING IN COURSE OF EMPLOYMENT.**—Under the Workmen's Compensation Act, the death of the driver of an automobile truck for a transfer company was occasioned by an accident that happened in the course of his employment, where it was shown that he had loaded his truck and left it, as customary, in the street adjacent to the office during the noon hour, while waiting for the freight depot to open, and who in obeying instructions to get the truck and go to the depot, was struck and killed by a passing automobile while crossing the street. (*Transfer Co. v. Industrial Acc. Com.*, 657.)
3. **REMOVAL OF CONCRETE FOUNDATIONS—STATUS OF INJURED PERSON EMPLOYEE AND NOT INDEPENDENT CONTRACTOR.**—A person engaged by a cemetery corporation to remove from its property, by the use of explosives and blasting, some concrete foundations, is an employee and not an independent contractor, and therefore entitled to compensation for injuries received in the course of the work, where he was paid by the day and there were no restrictions placed upon the power of the corporation to direct and control his operations at will. (*Cemetery Assn. v. Industrial Acc. Com.*, 706.)
4. **EMPLOYMENT IN USUAL COURSE OF BUSINESS.**—The employment by a cemetery corporation of a person skilled in the work of blasting and in the handling of explosives used in the conduct of

---

**WORKMEN'S COMPENSATION ACT (Continued).**

blasting operations, to remove by the use of explosives and blasting certain concrete foundations, while casual, is in the usual course of the corporation's business. (Id.)

- 5. VIOLATION OF BLASTING PERMIT—EXCESSIVE CHARGES OF DYNAMITE—MISCONDUCT WHEN NOT WILLFUL.**—The violation of the terms of a permit granted by a municipal corporation in the use of dynamite for blasting purposes is not willful misconduct, in the absence of evidence that such violation proximately or remotely caused the injury. (Id.)

**WRIT OF REVIEW.** See Contempt, 1, 2.























